Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1339

THEODORE Q. CHILDS,

Appellant,

vs.

LUCY GANT CHILDS,

Appellee.

On Appeal from the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1979

No.

THEODORE Q. CHILDS,

Appellant,

vs.

LUCY GANT CHILDS,

Appellee.

On Appeal from the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

JURISDICTIONAL STATEMENT

This appeal is taken from the final Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on July 11, 1979 and the order of the same Court dated December 3, 1979 denying appellant's motion for leave to appeal to the New York Court of Appeals from said order dated July 11, 1979. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

Opinions Below

Order of the Supreme Court of the United States Denying Motion for Leave to File Petition for Writ of Mandamus, Appendix A, p. 1a.

Order and Memorandum Decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated December 3, 1979 —— A.D.2d ——, Appendix B, p. 2a.

Order and Memorandum Decision of the Court of Appeals, State of New York dated October 9, 1979, —— N.Y. 2d ——, Appendix B, p. 4a.

Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, 69 A.D.2d 406, 416, N.Y.S.2d 533, Appendix B, p. 5a.

Opinion and Order of the Supreme Court of the United States in *Childs* v. *Childs,* No. 77-1653, March 19, 1979, 440 U.S. ——, 99 S.Ct. 1488, Appendix C, p. 25a.

Order and Memorandum Decision of the Supreme Court, Westchester County dated July 11, 1978, Appendix D, p. 26a.

Order and Memorandum of the Court of Appeals of the State of New York, dated February 22, 1978, 43 N.Y.2d 946, 403 N.Y.S.2d 896, Appendix E, p. 27a.

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated December 27, 1977, 60 A.D.2d 639, 400 N.Y.S.2d 358, Appendix E, p. 28a.

Decision and Order of the Supreme Court of the State of New York, Westchester County, dated December 30, 1976 (Unreported), Appendix E, p. 31a.

Jurisdiction

The Appellant in this appeal seeks to enjon the enforcement of Sections 237(b) and 244 of the New York Domestic Relations Law, which are unconstitutional statutes as presently worded in the light of *Orr* v. *Orr,* 440 U.S. ——, 99 S.Ct. 1109 (March 5, 1979), but which the New York Appellate Court determined to be constitutional by engaging in judicial legislation, and to protect Appellant's rights to due process of the law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States. In addition, Appellant seeks to compel the courts below to comply with the mandate of the Supreme Court of the United States issued on April 17, 1979 in *Childs* v. *Childs,* No. 1653, 440 U.S. ——, 99 S. Ct. 1488, which remanded the case "for further consideration in the light of *Orr* v. *Orr,* 440 U.S. —— (1979)"; which was evaded and annulled by Decision and Order of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979.

On the prior appeal of this case involving the question of unconstitutionality of Section 237(b) of the New York Domestic Relations Law under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, this Court vacated the judgment of the court below and remanded the case "for further consideration in the light of *Orr* v. *Orr*", which had declared Alabama's alimony statutes, which were worded similarly to the New York statute involving counsel fees, to be unconstitutional as being gender-based. On remand, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, in its Decision and Order, dated July 11, 1979, determined the said Section 237(b) to be constitutional. The said Appellate Court determined the said statute to be unconstitutional under *Orr* v. *Orr, supra,* as presently worded; but then deter-

mined it to be constitutional by engaging in judicial legislation by substituting "spouse" for "wife" and "spouse" for "husband."

The said Decision and Order of the Appellate Division dated July 11, 1979 also incorporated another appeal, by Appellant herein, from an order in an enforcement proceeding under Section 244 of the New York Domestic Relations Law based on denial of the equal protection of the laws and denial of due process under the Fourteenth Amendment to the Constitution of the United States. The Appellate Court by the same "reasoning" determined Section 244 of the New York Domestic Relations Law to be constitutional.

Having finally and conclusively determined and held both Section 237(b) and Section 244 of the New York Domestic Relations Law to be constitutional, the said Appellate Court remittted the matter to the trial court in the State of New York for hearing *de novo,* in an effort to garb its decision and order in a cloak of non-finality so as to preclude appeal from the Courts of the State of New York.

Appellant filed a timely appeal as of right from the aforesaid order of the said Appellate Division dated July 11, 1979 to the Court of Appeals of the State of New York pursuant to New York Civil Practice Law and Rules, Section 5601(b) relying upon the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which appeal by Appellant was dismissed by the said Court of Appeals by Order dated October 9, 1979, (App. B, p.4a), *sua sponte* "upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution."

As permitted by New York Civil Practice Law and Rules, Section 5602(b)(1) Appellant herein, then timely

filed a motion for leave to appeal to the Court of Appeals in the said Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the order of that Court dated July 11, 1979 again relying upon the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The motion was referred to and decided by the same four justices who rendered the Decision and Order dated July 11, 1979 from which leave to appeal was being requested. This motion was denied by said Appellate Court by Order dated December 3, 1979, (App. B, p.2a). Upon denial of this motion for leave to appeal to the Court of Appeals of the State of New York, no further appellate procedures in the State of New York were available to Appellant.

On February 19, 1980, Appellant timely filed a "Notice to Appeal to the Supreme Court of the United States" in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, (App. G, p.53a), and mailed same to counsel for Appellee and to Robert Abrams, Attorney General of the State of New York.

The challenge to the constitutionality of Section 237(b) of the New York Domestic Relations Laws was before this Court and considered in the prior appeal in *Childs* v. *Childs,* No. 77-1653, and was considered and decided on the merits on remand by the Appellate Court in its Decision and Order dated July 11, 1979 (App. B, p.*5a*). Challenge to the constitutionality of Section 244 of the New York Domestic Relations Law was considered and decided by the Appellate Court in its Decision and Order dated July 11, 1979 (App. B, p.5a). The Federal questions which are the subject of this appeal were timely raised, were considered and decided on the merits by the New York Courts below, and are subject to the jurisdiction of this Court. *Orr* v. *Orr, supra.*

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2) and Section 2101(c), this being an appeal which draws into question the validity of Sections 237(b) and 244 of the New York Domestic Relations Law on the ground that said statutes are repugnant to the Constitution of the United States, and the validity of the judicial legislation engaged in by the Appellate Court in its Decision and Order dated July 11, 1979 which is repugnant to the Doctrine of Separation of Powers as embodied in the Constitution of the United States, and violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In addition, this appeal draws into question the violation of the mandate of this Court issued on April 17, 1979 in the prior appeal to this Court by the said Appellate Court in its Decision and Order dated July 11, 1979. (App. B, p.5a)

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the Decision and Order of the said Appellate Court, dated July 11, 1979 by direct appeal in this case: *Orr* v. *Orr,* 440 U.S. ——, 99 S.Ct. 1102; *Childs* v. *Childs,* 440 U.S. ——, 99 S.Ct. 1488; *Lathrop* v. *Donohue,* 367 U.S. 820, 81 S.Ct. 1826 (1961); *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708 (1961); *In re Sanford Fork and Tool Company,* 160 U.S. 247, 16 S.Ct. 291 (1895); *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat) 304, 4 L.Ed. 97 (1816).

The said Appellate Court either misconstrued or refused to follow the mandate of this Court issued in the prior appeal to this Court in this case on April 17, 1979; and where the Appellate Court on remand does not execute the decree of this Court according to its mandate, its action may be controlled either by a new appeal or by writ of mandamus. *In re Sanford Fork and Tool Company,* supra, p. 256; *United States* v. *Haley,* 371 U.S.

18, 83 S.Ct. 11 (1962); *Sibbald* v. *United States,* 37 U.S. (12 Pet.) 488, 492 (1838); *Magwire* v. *Tyler,* 84 U.S. (17 Wall) 253, 21 L.Ed 576 (1973); *Martin* v. *Hunter's Lessee, supra,* p.355.

There can be no question as to the finality within the meaning and intent of 28 U.S.C. 1257(2) of the Decision and Order dated July 11, 1979 of the said Appellate Court insofar as it determined the constitutionality of Sections 237(b) and 244 of the New York Domestic Relations Law by engaging in judicial legislation, and refused or failed to follow the mandate of this Court in this case issued on April 17, 1979. No further appellate review of these questions is available in the State of New York. Cf. *Gotthilf* v. *Sills,* 375 U.S. 79, 84 S.Ct. 187 (1963); *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U.S. 548, 551-2, 65 S.Ct. 770 (1945); *Department of Banking* v. *Pink,* 317 U.S. 264, 267-8, 63 S.Ct. 233 (1942); cf. *Gorham* v. *Washington University,* 316 U.S. 98, 100-101, 62 S.Ct. 962 (1941); *Richfield Oil Corp.* v. *Board,* 329 U.S. 69, 73-74, 67 S.Ct. 156 (1946).

The Appellant's case below rests solely on and is controlled by the Federal questions raised below and which are being raised on this appeal to the Supreme Court of the United States. *Pope et al* v. *Atlantic Coast Line Ry. Co.,* 345 U.S. 379, 73 S.Ct. 379 (1953); *Clark* v. *Willard,* 292 U.S. 112, 54 S.Ct. 615 (1934); *Mills* v. *State of Alabama,* 384 U.S. 214, 86 S.Ct. 1434 (1966). The Federal questions raised on this appeal have been wrongfully decided by the New York Appellate Court and, if they were decided the other way by a holding that the statutes were unconstitutional, the Federal questions would be determinative of the litigation and the finality requirement of 28 U.S.C. 1257(2) satisfied. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975). The order of the highest court in New York on the Federal questions raised on

this appeal is final for purposes of review by this Court, notwithstanding that there may be further proceedings in the state courts where remitted for trial *de novo,* where the Federal questions are conclusive. *Cox Broadcasting Corp.* v. *Cohn, supra; Mills* v. *State of Alabama, supra.* Finally, the remittal by the Appellate Court for a trial *de novo* is impermissible and a nullity under Section 237 (b) of the New York Domestic Relations Law since any direction made to compel the husband to pay his wife's counsel fees "may only be made in the order or judgment by which the particular application or proceeding is finally determined." (App. F, p.50a). The custody proceeding was fully and finally determined by the Decision and Order of the Supreme Court, Westchester County, dated December 30, 1976 (App. E, p.31a).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C., Section 2103.

Constitutional and Statutory Provisions Involved

The following Constitutional and Statutory provisions are set forth in the Appendix annexed hereto:

The Constitution of the United States, Article I, Section 1; Article III, Sections 1 and 2; Article VI; and Amendment XIV, Section 1;

The Constitution of the State of New York, Article III, Section 1, Article VI, Section 5, subdivision (a) and Section 7, subdivision (a);

The United States Code, Title 28, Sections 1257, 1651(a), 2104 and 2106;

New York Domestic Relations Law, Sections 237 (b), 238 and 244.

Questions Presented

1. Whether Section 237(b) and Section 244 of the New York Domestic Relations Law are unconstitutional as denying Appellant the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States in the light of *Orr* v. *Orr,* 440 U.S. 268, 99 S.Ct. 1102. 47 LW 4224 (1979)

2. Whether the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, violated the mandate of the Supreme Court of the United States issued on April 17, 1979 in *Childs* v. *Childs,* 440 U.S. ——, 99 S.Ct. 1488, by its Decision and Order dated July 11, 1979 determining Section 237, subdivision (b), of the New York Domestic Relations Law to be constitutional under the Equal Protection Clause of the Constitution of the United States by engaging in prohibited judicial legislation in violation of Article I, Section 1 of the Constitution of the United States and Article III, Section 1 of the Constitution of the State of New York, and thereafter remitting the matter to the trial court for hearing *de novo.*

3. Whether the determination of the said Appellate Court that Section 237(b) and Section 244 of the New York Domestic Relations Law as written and previously applied in *Childs* v. *Childs* were unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States in the light of *Orr* v. *Orr,* and a further determination that said Sections were constitutional by judicial legislation, and the retroactive application of such newly construed statutes as being constitutional to Appellant in his proceedings which were concluded in 1976 under the law as enacted by the New York State Legislature, was a denial of due process of the law under the Fourteenth Amendment to the Constitution of the United States.

4. Whether the said Appellate Division by engaging in judicial legislation in its Decision and Order dated July 11, 1979 by substituting the words "spouse" for "husband" and for "wife" in Section 237(b) and Section 244 of the New York Domestic Relations Law, completely ignoring the manifest legislative intent and the irrefutable and incontestable meaning of the words substituted, acted in an arbitrary and capricious manner and violated the rights of Appellant under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

5. Whether Section 237(b) and 244 of the New York Domestic Relations Law, which are clearly unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in the light of *Orr* v. *Orr,* are inoperative as if never enacted and null and void *ab initio* in view of their unconstitutionality.

Statement of the Case, Including the Raising of and Ruling upon the Federal Questions Below

This case began in the Supreme Court, State of New York, Westchester County in January 1976 as a contested post-divorce custody proceeding involving the application of the Appellant herein to have custody of two infant children of the marriage awarded to him. At the conclusion of the testimony in the custody proceeding the former wife made application for an award of counsel fees pursuant to Section 237(b) of the New York Domestic Relations Law. The Appellant herein opposed said application but did not apply for an award to him of counsel fees since no such award was authorized under the applicable statute, Section 237(b). (App. F, p.50a)

The facts before the Court as to the circumstances of the respective parties were that Appellant herein was a lawyer who in 1976 was earning approximately $19,000.00 per year, had assets of approximately $12,500.00 and was in debt to the extent of $61,781.49, whereas the former wife and mother had assets of approximately $464,000.00.

By Decision and Order dated December 30, 1976, the Court awarded custody of the two children of the Appellant and also awarded counsel fees and disbursements in the total amount of $13,500.00 to be paid to the former wife's attorneys by the Appellant. (App. E, p.31a)

The Appellant herein appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from that part of the said Decision and Order which awarded counsel fees and disbursements to the former wife contending (a) that Section 237(b) of the New York Domestic Relations Law was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because under it the Court could only award counsel fees to a wife or mother and (b) that the award of counsel fees was an abuse of discretion under the circumstances before the Court, even assuming the constitutionality of the statute. This was the first time in these proceedings that the question of the unconstitutionality of Section 237(b) of the New York Domestic Relations Law could be raised by the Appellant herein, since he could not apply for an award and he was not injured, unless and until an award was made against him.

The Appellate Division, Second Department, in its Order and Memorandum Decision entered on December 27, 1977, (App. E, p.28a) modified the award of counsel fees by reducing it to $5,000.00, plus $1,500.00 disbursements. The Court stated that it did not reach the issue raised by Appellant as to the constitutionality of subdivision

(b), of Section 237 of the New York Domestic Relations Law, because the "[a]ppellant, having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute * * *." (App. E, p.30a)

Appellant appealed to the Court of Appeals of the State of New York from that order of the Appellate Division. A motion was made to dismiss the appeal and it was granted and the appeal dismissed by an Order dated February 22, 1978 upon the ground that the Appellant was not aggrieved by the modification at the Appellate Division and that "no substantial constitutional question is directly involved." (App. E, p.27a)

On May 19, 1978, Appellant filed a Petition for a Writ of Certiorari in the Supreme Court of the United States raising the question of whether Section 237, subdivision (b) of the New York Domestic Relations Law, which provides that the court may award counsel fees in a custody proceeding only to a wife or mother upon her application therefor, and which makes no such provision for either the court to make such an award to a husband or father, or for an application to be made by a husband or father, denied Appellant herein the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

On March 19, 1979, this Court, in *Childs* v. *Childs,* No. 77-1653, (App. C, p.25a) entered the following order:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Second Judicial Department, for further consideration in light of *Orr* v. *Orr,* 440 U.S. (1979). Mr. Justice Stewart dissents."

This Court in *Orr* v. *Orr*, No. 77-1119, March 5, 1979, 440 U.S. ——, 99 S.Ct. 1102, in construing the Alabama

statutory scheme which imposed alimony obligations on husbands but not on wives determined that statutory scheme to be unconstitutional under the Equal Protection Clause of the Constitution of the United States. Section 237, subdivision (b), of the New York Domestic Relations Law has an identical statutory scheme in that it imposes obligations to pay counsel fees on husbands or fathers, and not on wives or mothers, and in the light of this Court's decision in *Orr* v. *Orr,* the New York statutory scheme was likewise unconstitutional under the Equal Protection Clause of the Constitution of the United States.

On remand by this Court to the Appellate Division of the Supreme Court of New York, Second Judicial Department, "for further consideration in light of *Orr* v. *Orr,*" the said Appellate Division in its Decision and Order dated July 11, 1979, (App. B, p.5a) ignored both the determination and the Mandate of this Court. The State Appellate Court initially concluded that New York's statutory scheme under Section 237, subdivision (b), of the Domestic Relations Law was unconstitutional as presently drafted, but then blithely proceeded through a process designated as reading the statute expansively to construe said Section 237, subdivision (b), to be constitutional by substituting the word "spouse" for "wife" since the said Appellate Court deemed the statute under this construction process "to authorize counsel fees to either spouse on a gender-neutral, needs-basis only." As a result of its final determination that Section 237, subdivision (b), of the New York Domestic Relations Law was constitutional, the said Appellate Division remitted the entire matter to the New York trial court for a hearing *de novo.*

The said Appellate Division incorporated in its Decision and Order dated July 11, 1979, (App. B, p.5a) not

only the question of the unconstitutionality of Section 237, subdivision (b), of the New York Domestic Relations Law which was remanded by this Court, but also an appeal from an order in an enforcement proceeding under Section 244 of the New York Domestic Relations Law which was not before this Court in the prior appeal.

The enforcement proceeding under Section 244 of the New York Domestic Relations Law was instituted and continued after the filing for a Writ of Certiorari in this Court on May 19, 1978, since there was no stay in effect. By Order and Memorandum Decision dated July 11, 1978 (App. D, p.26a), the Supreme Court, Westchester County granted judgment against the Appellant herein pursuant to Section 244 of the New York Domestic Relations Law for "arrears, and payment of counsel fees, disbursements and costs amounting to $6,500.00." Upon the granting of the enforcement order, the Appellant filed an appropriate appeal with the Supreme Court of the State of New York, Second Judicial Department and filed and obtained a stay by filing the required bond. In making said appeal from the Order and Memorandum Decision dated July 11, 1978, (App. D, p.26a) the Appellant contended that the failure of the Court to hold a hearing and properly to exercise the discretion required by Section 244 of the New York Domestic Relations Law violated Appellant's right to due process guaranteed by the Constitution of the United States and the Constitution of the State of New York and also that Sections 237(b), 238 and 244 of the New York Domestic Relations Law are unconstitutional in that they violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The issue of the constitutionality of Section 237(b) of the New York Domestic Relations Law under the Equal Protection Clause in that an award under the statute may be made only to a wife and thus constitutes sex-based discrimination was first raised in the affidavit in opposition

to the motion brought under Section 244 of the Domestic Relations Law in the Supreme Court, Westchester County, for a judgment directing payment of the counsel fees.

The said enforcement order was based upon the judgment of the said Appellate Division dated December 27, 1977 which was vacated by this Court in *Childs* v. *Childs*, No. 77-1653, (App. C, p.25a). In view of the fact that the underlying order upon which the enforcement order was based had been vacated by this Court, the questions involving Section 244 of the New York Domestic Relations Law were rendered moot.

It was Appellant's view that the enforcement order likewise should have been vacated by the Appellate Division. Instead, the said Appellate Division following argument on June 19, 1979 in the Section 244 enforcement proceeding, in its Decision and Order dated July 11, 1979 combined both the remand from this Court on the prior appeal and the appeal on the enforcement proceeding under Section 244 of the New York Domestic Relations Law.

It should be noted that the Appellant herein, in spite of repeated inquiries of the said Appellate Court, was never afforded an opportunity to either brief or argue the case on remand from this Court. The appeal from the Order and Memorandum Decision dated July 11, 1978 (App. D, p.26a) in the enforcement proceeding under Section 244 of the New York Domestic Relations Law was ordered by Order of the Appellate Division of the Supreme Court of the State of New York, dated December 26, 1978 to be perfected for the April 1979 term, which began March 19, 1979, with Appellant's brief to be filed by February 7, 1979 and the appeal ordered on the calendar for the April 1979 term. Appellant's brief was filed timely. The appeal did not appear on the calendar of said Appellate Court for the April 1979 term, and

Appellant could elicit no information from the Office of the Clerk of the Court concerning the placing of the appeal on the calendar for argument. Ultimately, around the first of June 1979, the matter did appear on the Court calendar for argument on June 19, 1979. Appellant argued the appeal of the Section 244 proceeding. Appellee's counsel and the Attorney General of the State of New York argued the remand from this Court, contending that the Appellate Court should construe the statute to be gender-neutral to conform it to requirements of *Orr*. Appellee's counsel informed Appellant after the appeal argument that the remand and the appeal in the Section 244 enforcement proceeding had been consolidated for argument. The Day Calendar for June 19, 1979 of the said Appellate Court listed only the Section 244 enforcement proceeding for argument. Inexplicably Appellant was never afforded the right or opportunity by the Appellate Court to argue the remand from this Court of the prior appeal.

On August 16, 1979, the Appellant herein filed timely a Cross Notice of Appeal appealing as of right to the Court of Appeals of the State of New York from the aforesaid order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, (App. B, p.5a), relying upon the construction of the Equal Protection Clause of Seciton 1 of the Fourteenth Amendment to the Constitution of the United States as applied to the said Appellate Court's determination that Section 237, subdivision (b), of the New York Domestic Relations Law was constitutional, in contravention of the mandate of this Court. In addition, in this appeal to the New York Court of Appeals, Appellant relied upon the Equal Protection Clause as applied to the Appellate Court's determination that Section 244 of the New York Domestic Relations Law was constitutional and, further raised the issue on appeal that

said Appellate Court in its Order and Decision dated July 11, 1979 had failed to determine or pass upon the matter of the violation of Appellant's right to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6, of the Constitution of the State of New York due to the failure of the Court below to hold a hearing and use its discretion as required by Section 244 of the New York Domestic Relations Law.

By Order of the Court of Appeals of the State of New York dated October 9, 1979, (App. B, p.4a) the cross-appeal of the Petitioner herein was dismissed "by the Court *sua sponte,* upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution."

On November 7, 1979, pursuant to the provisions of the New York Civil Practice Law and Rules, Section 5602, Appellant herein filed with the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, a motion for leave to appeal to the Court of Appeals of the State of New York on the grounds that it was a cause of novel impression and importance, in that the Order of July 11, 1979 appealed from finally determined the validity and construction of Section 237(b) of the New York Domestic Relations Law and determined said Section to be constitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States by judicial legislation in direct contravention of the mandate of this Court in *Childs* v. *Childs,* No. 77-1653, (App. C, p.25a) and also determined Section 244 of the New York Domestic Relations Law to be constitutional by judicial legislation although it is clearly in violation of the Equal Protection Clause in light of the decision of this Court in *Orr* v. *Orr,* No. 77-1119. In making this

motion for leave to appeal to the Court of Appeals, the Appellant herein asked that the Appellate Division certify the following questions of law for appellate review:

1. In light of the decisions and orders of the Supreme Court of the United States in *Orr* v. *Orr,* No. 77-1119, and *Childs* v. *Childs,* No. 77-1653, are Sections 237(b) and 244 of the New York Domestic Relations Law unconstitutional as constituting gender-based discrimination under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

2. May a Court construe words of unambiguous meaning in a statute in order to uphold its constitutionality in the face of the limitations upon the powers of the Courts to legislate imposed by the Constitution of the United States and the Constitution of the State of New York and the express reservation of the legislative power to the legislature of the State contained in the Constitution of the United States and the Constitution of the State of New York?

By Order and Memorandum Decision of the said Appellate Division dated December 3, 1979, (App. B, p.2a) this motion for leave to appeal was denied.

On October 25, 1979, Appellant filed a Motion for Leave to File Petition for a Writ of Mandamus and Petition for a Writ of Mandamus in this Court praying that this Court issue a Writ of Mandamus to the New York Appellate Court and the Justices thereof directing them to comply with the mandate of this Court issued on April 17, 1979 in *Childs* v. *Childs,* No. 77-1653 (App. C, p.25a). By Order of this Court dated January 7, 1980, the motion was denied (App. A, p.1a).

The Federal Questions are Substantial

On the prior appeal of this case to this Court, the Court vacated the judgment and remanded the case to the New York Appellate Court for "further consideration in light of *Orr* v. *Orr.*" (App. C, p.25a)

This Court in *Orr* v. *Orr* determined the Alabama statutory scheme, which imposed alimony obligations on husbands but not on wives, to be unconstitutional under the Equal Protection Clause of the Constitution of the United States. The New York Domestic Relations Law, including specifically Sections 237(b) and 244, has an identical statutory scheme in that the obligations are imposed on the husbands or fathers and not on the wives or mothers. In the light of this Court's decision in *Orr* v. *Orr,* the New York statutory scheme was likewise unconstitutional under the Equal Protection Clause of the Constitution of the United States. In *Orr* v. *Orr,* 440 U.S. —— 99 S.Ct. 1102 the majority speaking through Mr. Justice Brennan stated:

> "In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending the benefits to the previously disfavored class or by denying benefits to both parties (e.g. by repealing the statute as a whole). In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia,* amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties." Page 1108.

Mr. Justice Brennan in referring to the State action which may satisfy the Constitution's commands in an equal protection attack upon a statute clearly means the action of the State Legislature in enacting or repealing laws

as provided in the Constitutions of the various states and the Constitution of the United States. He clearly indicates that one of the alternatives whereby the State may satisfy the Constitution's demands is "by denying benefits to both parties (e.g. by repealing the statute as a whole)." A Court may not "repeal" a statute, only the State Legislature can do that.

However, some commentators have suggested in the post *Orr* period that the states may meet such challenges to the constitutionality of gender-based statutes by judicial construction and may do this by substituting gender-neutral words for gender-based words, even though there is no ambiguity of meaning. The State Courts have latched on to this suggestion as a method of sustaining invalid gender-based statutory schemes in the face of legislative inaction. Both the Alabama and New York Courts have followed this unconstitutional method on remand of appeals from the Supreme Court of the United States in *Orr* v. *Orr* and in *Childs* v. *Childs,* respectively.

The New York Court failed and refused to follow the mandate of this Court issued in the prior appeal of this matter on April 17, 1979 and by prohibited judicial legislation determined the challenged statutes to be constitutional, imposed them retroactively upon the Appellant herein, and while doing so ignored the fact that the New York State Legislature has refused to enact submitted gender-neutral bills amending the said statutes. The Court, while piously indicating it was effectuating the legislative intent of the New York Legislature, ignored the fact that the Legislature evidenced the opposite intent by refusing to enact the submitted gender-neutral bills.

The Federal questions presented on this appeal are both fundamental and substantial. They involve the question of the violation of the due process of the law and the equal

protection of the law by the laws and courts of the State of New York which rights are guaranteed by the Fourteenth Amendment to the Constitution of the United States. They involve the violation of the Doctrine of Separation of Powers as provided by the Constitution of the United States and the Constitution of the State of New York arising from the act of judicial legislation by the New York Appellate Court in its Decision and Order dated July 11, 1979 "construing" words not susceptible to construction in order to achieve a result pre-ordained by said Court. They involve the force and effect of the mandate of this Court issued in the prior appeal of this case on April 17, 1979 under Article VI of the Constitution of the United States, and, finally, they involve the substantive effect of the determination that a statute is unconstitutional—Is the statute unconstitutional retroactively? Is the unconstitutional statute null and void *ab initio?*

I

Sections 237(b) and 244 of the New York Domestic Relations Law are unconstitutional under the prior appeal of this matter to this Court in the light of *Orr* v. *Orr*.

Both Section 237(b) and Section 244 of the New York Domestic Relations Law (App. F, pp. 50a and 51a) provide that statutory benefits may be granted to the wife against the husband. The husband may not receive such benefits under these statutes. This Court in *Orr* v. *Orr, supra,* held the Alabama statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States where only the wives could receive alimony payments from husbands. Similarly, Section 237(b) and Section 244 must fall under

the proscription of *Orr* v. *Orr* as being irredeemably unconstitutional as enacted by the Legislature of the State of New York and presently worded.

II

The Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, violates the mandate of this Court issued on April 17, 1979 in the prior appeal of this matter.

In *Childs* v. *Childs,* No. 77-1653 (App. C, p. 25a) this Court vacated the judgment below and remanded the case to the New York Appellate Court "for further consideration in the light of *Orr* v. *Orr*", and issued its mandate on April 17, 1979. On remand, the New York Appellate Court and the Justices thereof refused to follow the said mandate of this Court. In its Decision and Order dated July 11, 1979 (App. B, p. 5a), the said Appellate Court initially determined that Section 237(b) of the New York Domestic Relations Law was irrevocably unconstitutional in the light of *Orr* v. *Orr.* The said Appellate Court then proceeded to construe Section 237(b) to be constitutional by substituting the word "spouse" for the word "wife" in the statute. As so re-worded by the Appellate Court, the Court then held the statute constitutional since it was deemed "to authorize counsel fees to either spouse on a gender-neutral, needs-basis only."

In so construing Section 237, subdivision (b), of the New York Domestic Relations Law as being constitutional, the said Appellate Court stated:

> "Such a construction is consistent with the traditional rule that where a statute has been found to violate the equal proection clause, courts will traditionally read into it the improperly excluded class (see, e.g., *Califano* v. *Westcott,* —— U.S. —— (47 U.S.L.W. 4817, 4821) (aid to dependent children benefits); *Califano* v. *Goldfarb,* 430 U.S. 199 (Social Security Act survivorship benefits); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, *supra* (same); *Fronteiro* v. *Richardson,* 411 U.S. 677, *supra* (armed forces fringe benefits); *Levy* v. *Louisiana,* 391 U.S. 68 (wrongful death actions); *Matter of Passante* v. *Walden Printing Co.,* 53 A.D.2d 8, 13 (worker's compensation survivorship benefits)." 419 N.Y.S.2d at 531 (App. B, p. 20a)

In setting forth the so-called "traditional rule" with citations, the Court below is clearly trying to justify its prohibited judicial legislation and is ignoring the mandate of this Court. None of the cited cases stand for the principle that a court may usurp the functions of the legislature or that this Court usurped the functions of the legislature. Furthermore, all the cited cases involve Federal cases arising under Federal statutes, and cannot stand for a rule that the usurpation of the powers of the State Legislature by the State Courts can be validated and not be subjected to constitutional attack.

Likewise, the Appellate Court below in its Decision and Order dated July 11, 1979 (App. B, p. 5a) cites Section 238 of the New York Domestic Relations Law, as presently worded, which "presently allows the trial court to require either party to pay the expenses of the other, including counsel fees," and then states that by reading this statute, "in tandem" with Section 237, subdivision (b), Section 237, subdivision (b), can be "constitutionally read as substituting the word 'spouse' for 'wife'." In fact such substitution does not suffice to make Section 237, subdivision (b), of the New York Domestic Relations Law gender-neutral, even if permissible, for no similar substitution is

proposed for the other pertinent words; "husband," "father" or "mother."

Section 238 of the New York Domestic Relations Law to which the Court refers was amended in 1978 effective July 28, 1978, so as to be gender-free. *New York Laws 1978,* Chap. 529, Section 1. Prior to that date, awards under Section 238 of the New York Domestic Relations Law could only be made to the wife and against the husband. The Appellate Court ignored the fact that Section 237(b) of the New York Domestic Relations Law was also amended in 1978 effective 30 days after June 19, 1978, *New York Laws 1978,* Chap. 444, Section 1, but no attempt was made in such amendment to change the wording of such statute to make it gender-neutral, which amendment added a new last sentence reading:

> "Any applications for counsel fees and expenses may be maintained by the attorney for the wife in counsel's own name in the same proceeding."

This Section 237(b) as amended in 1978 is set forth in the Decision and Order dated July 11, 1979 (App. B, pp. 10a-11a). In fact this 1978 amendment to Section 237(b) of the New York Domestic Relations Law re-affirms the gender-based nature of the entire statute since it provides that only the attorney for the wife may maintain the application for counsel fees and expenses. The Appellate Court callously disregarded this amendment or any reference thereto in its Decision and Order dated July 11, 1979. Obviously the State Appellate Court cannot "deem" the statute to mean what the legislature obviously did not intend it to mean and explicitly enacted otherwise.

Furthermore, following the decisions of this Court in *Orr* v. *Orr* on March 5, 1979 and *Childs* v. *Childs* on March 19, 1979, identical bills were submitted to the New York State Senate and the New York State Assembly on May

23, 1979 which proposed a comprehensive revision of the Domestic Relations Law and related Family Law statutes to render said statutes gender-neutral. These bills proposed to amend Section 237(b) of the New York Domestic Relations Law to make it gender-neutral by inserting the words "or wife or mother" after the words "husband or father" in indicating who may be directed to pay counsel fees under such statute, by inserting the words "husband or father or" before the words "wife or mother" in determining the application or proceeding in which said sums may be awarded or paid, and lastly by inserting the words "husband or" in the final sentence which was added by Laws 1978, Chap. 444, Section 1 referred to above. The New York Assembly passed the bill which included the aforesaid amendment to Section 237(b) on June 13, 1979. On June 20, 1979 the Senate version of this bill was referred to the New York State Senate Judiciary Committee. The bill was not reported out of the Senate Judiciary Committee and died in the Committee. *New York Legislative Record and Index 1979,* Pages S458, S459 and A442. This Court should note that all these actions by the New York State Legislature in 1978 and 1979 occurred prior to the date of the Decision and Order of the New York Appellate Court on July 11, 1979 in which said Court indicated that it was evidencing a legislatively stated or indicated purpose. It is clear that the Appellate Court was not effectuating a legislative purpose, it was engaging in prohibited judicial legislation in an effort to avoid the mandate of this Court.

Both the New York Court and the Alabama Court have ignored the respective mandates issued by this Court. Both Courts have violated the Doctrine of Separation of Powers by engaging in prohibited judicial legislation which is clearly impermissible.

Section 237(b) of the New York Domestic Relations Law as presently enacted falls within the proscription of

Orr v. *Orr* and is irrevocably unconstitutional. Any change in this statutory scheme contained in the New York Domestic Relations Law must come from the Legislature of the State of New York. Article III, Section 1 of the Constitution of the State of New York; Article I, Section 1 of the Constitution of the United States. *Hessen* v. *Hessen,* 33 N.Y.2d 406, 353 N.Y.S.2d 421 (1974); *Leffler* v. *Leffler,* 50 A.D.2d 93, 95, 376 N.Y.S.2d 176 (1975), affirmed 40 N.Y.2d 1036, 391 N.Y.S.2d 855 (1976); *Northrup* v. *Northrup,* 43 N.Y.2d 566, 572, 402 N.Y.2d 997, 999 (1978); *Erkenbach* v. *Erkenbach,* 96 N.Y. 456, 465 (1883).

The Courts of the State of New York may adjudicate, they cannot legislate. Article III, Section 1 and Article VI, Section 5(a) and 7(a) of the Constitution of the State of New York; Article I, Section 1 and Article III, Section 1 of the Constitution of the United States; *U. S.* v. *Carolene Products Co.,* 304 U.S. 144, 151-4, 58 S.Ct. 778, 783-4 (1938); *People* v. *Bielecki,* 56 Misc. 2d 730, 733, 291 N.Y.S. 2d 217, 219 (1968); *People* v. *Friedman,* 302 N.Y. 75, 79, 96 N.E.2d 184, 185-6 (1950); *People* v. *Kupprat,* 6 N.Y.2d 88, 90, 188 N.Y.S.2d 483, 485 (1959).

Clearly, a Court may not substitute itself for the legislature merely because the legislature has failed to act. *Clasen Management Corp.* v. *Temporary State Housing Rent Commission,* 29 Misc. 2d 258, 260, 217 N.Y.S.2d 287, 290 (1961). The Court may not legislate under the guise of interpretation of a statute; *Bright Homes, Inc.* v. *Wright,* 8 N.Y.2d 157, 162, 203 N.Y.S.2d 67, 70 (1960). Mere expediency cannot transfer the legislative powers to the Court, even though a vacuum may exist in the statutory scheme. *People* v. *System Properties, Inc.,* 2 N.Y.2d 330, 345, 160 N.Y.S.2d 859, 868 (1957); *Kessel* v. *D'Amato,* 97 Misc. 2d 675, 412 N.Y.S.2d 303, 310 (1979).

In *Orr* v. *Orr, supra,* this Court, if it determined that it possessed the power and authority, could have construed "husband" to mean "husband or wife," or "spouse," and "wife" to mean "wife or husband" or "spouse", but it did not. For this Court well knew that it possessed no power to engage in legislative acts. However, the New York Appellate Court ignored both the mandate issued by this Court in *Childs* v. *Childs,* No. 77-1653 (App. C, p. 25a) and the express limitation on its powers to legislate contained in the Constitution of the United States and the Constitution of the State of New York.

There is no ambiguity in the meaning of Section 237, subdivision (b), of the New York Domestic Relations Law. The New York Appellate Court merely ignored the basic rules of construction. It ignored the elementary rule of "Inclusio unius est exclusio alterius." If the statute states "wife," it certainly excludes "husband," and if it states "husband," it likewise excludes "wife." If it includes "father," it excludes "mother," and conversely. It refused to recognize that no ambiguity exists in the meaning of the words "husband" or "father," or "wife" or "mother."

In *Caban* v. *Mohammed,* No. 77-6431, 440 U.S. , 99 S.Ct. 1760 (April 24, 1979), this Court held Section 111, subdivision 1(c), of the New York Domestic Relations Law to be unconstitutional, in that the Equal Protection Clause of the Fourteenth Amendment was violated by the sex-based distinction between unmarried mothers and unmarried fathers contained therein. The challenged provision of the New York Domestic Relations Law permitted an unwed mother, but not an unwed father, to block adoption of their illegitimate child. This Court did not endeavor to construe "mother," as used in the challenged section, to mean "mother or father," but read the statute as written and found it to constitute gender-based discrimination.

Significantly, the same Appellate Court that rendered the Decision and Order dated July 11, 1979, which is the

subject of this appeal, rendered a decision on December 10, 1979 in *Greschler* v. *Greschler,* —— A.D.2d ——, 422 N.Y.S.2d 718, which determined Section 5-311 of the New York General Obligations Law, which unconditionally bars a wife from renouncing support from her husband while conditioning a husband's right to renounce support from his wife, to be unconstitutional. In determining this Section of the New York General Obligations Law to be unconstitutional, the Appellate Court did not endeavor to reconstruct the statute as it endeavored to do in construing Section 237(b) of the New York Domestic Relations Law in Appellant's case (App. B, p. 5a). It made no attempt to construe "wife" to mean "spouse", or "husband" to mean "spouse", as it did in the *Childs* case. The Appellate Court endeavored to distinguish its decision in *Childs* v. *Childs* dated July 11, 1979 on the basis of a "strong public policy reason." In the *Greschler* case the said Appellate Court refused to engage in judicial legislation, endeavored to distinguish its decision in the *Childs* case by indicating that it was unable to discern legislative intent sufficient to sustain a judicial reconstruction of the statute. Appropriately, the Appellate Court, in the *Greschler* case stated:

> "I cannot predict what the legislature will ultimately do and it would be presumptuous to assume it would extend the protection of Section 5-311 to husbands. Courts should not legislate. However, a court that is asked to declare a separation agreement void because it violates a statute cannot do so if the statute itself is unconstitutional. The support provision of Section 5-311 is unconstitutional and, therefore, the plaintiff's second pleaded cause of action must be dismissed." 422 N.Y.S.2d 718, 723.

This Court has consistently held that a lower court with jurisdiction over a case on remand under a Supreme Court

mandate is foreclosed from reconsidering matters decided by the Supreme Court. *United States* v. *Haley,* 371 U.S. 18, 83 S.Ct. 11 (1962); *Sibbald* v. *United States,* 37 U.S. (12 Pet.) 488, 9 L.Ed. 1167 (1838). When a case has once been decided by this Court on appeal and remanded, what was before this Court and disposed of by its decree is considered as finally settled, and the court to which it is remanded is bound by the decree as of the law of the case. *In re Sanford Fork & Tool Co.,* 160 U.S. 247, 16 S.Ct. 291 (1895); *Magwire* v. *Tyler,* 84 U.S. (17 Wall) 253, 21 L.Ed. 576 (1873). This Court has long held that a "final judgment of this court is supposed to be conclusive upon the rights which it decides . . .," and that a final judgment of this Court is conclusive upon the parties and cannot be re-examined. *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat) 304, 355, 4 L.Ed. 97 (1816).

This Court may if it so wishes, compel State Courts to comply with its mandates. It may issue appropriate writs to effectuate its mandate. The judges of a state must pronounce the law applicable to the case in judgment which must be decided not merely according to the laws or the Constitution of the state, but according to the laws and the Constitution of the United States which is the supreme law of the land. Article VI, Constitution of the United States. *Martin* v. *Hunter's Lessee, supra.*

III

The determination by the New York Appellate Court that Sections 237(b) and 244 of the New York Domestic Relations Law are constitutional, which statutes are clearly unconstitutional under *Orr* v. *Orr*, and the retroactive application of such determination of constitutionality to appellant is a denial of the due process of the law under the Fourteenth Amendment to the Constitution of the United States.

For over one hundred years the Domestic Relations Laws of the State of New York have granted rights to wives against the husbands while completely failing and refusing to make similar grants to husbands against wives. This course of legislative and public policy has been fully and completely recognized and enforced by all the Courts of the State of New York and there has been no way, either substantively or procedurally, whereby a husband could obtain such rights. The legislature in enacting these statutes and the Courts in interpreting and enforcing these statutes have never wavered from that elemental and commonly understood meaning of "wife" and "husband."

It was only following this Court's decision in *Orr* v. *Orr* and the remand of this Court in *Childs* v. *Childs* to the New York Appellate Court that the New York Courts realized that the New York State Legislature had been lagging behind the social needs and developments of Twentieth Century society, and thereupon determined that they would reconstrue the words "wife" and "husband" to mean "spouse" in both cases in a judicial attempt to salvage a patently unconstitutional statute. The said Appellate Court in its Decision and Order dated July 11, 1979 (App. B, p. 5a), enacted by judicial fiat entirely new Sections 237 (b) and 244 of the New York Domestic Relations Law. These new Sections were new in meaning and new in intent and construction. These changes enacted by said Appellate Court represented a one hundred and eighty degree turn in the intent and meaning of these statutes.

The award of counsel fees to the wife against Appellant in the *Childs* case was made by the order of the Supreme Court, Westchester County, dated December 30, 1976. (App. E, p.31a) At that time the meaning, wording and intent of Section 237(b) of the New York Domestic Relations Law was clear. There was no doubt that "wife" meant "wife" and "husband" meant "husband" and that only a wife could receive an award of counsel fees from the husband. Similarly the awarding of the judgment for said counsel fees by Order and Memorandum Decision of the Supreme Court, Westchester County, dated July 11, 1978 (App. D, p.26a) was made under the statute which clearly permitted the judgment only to be awarded to the wife against the husband. There was no question of a husband ever obtaining such a judgment under this New York statute. It had never even been attempted. After this Court issued its mandate on April 17, 1979 in *Childs* v. *Childs* (App. C, p.25a) the Appellate Division in its Decision and Order dated July 11, 1979 (App. B, p.5a) proceeded to reconstrue both of the said statutes by substituting "spouse" for "wife" and for "husband" so as to make them gender-neutral. Having accomplished this purpose by engaging in prohibited legislation, the Court applied the completely new principle of law it had enunciated to the *Childs* case and thereupon ordered the matter remitted to the trial court for further hearing (App. B, p.5a).

Sections 237(b) and 244 of the New York Domestic Relations Law enacted by the New York State Legislature and existing on December 30, 1976 and July 11, 1978 were both clearly unconstitutional under the Equal Pro-

tection Clause of the Fourteenth Amendment to the Constitution of the United States in the light of *Orr*. These statutes were null and void. The construction by the said Appellate Division in its Decision and Order dated July 11, 1979 was impermissible and unconstitutional under Article I, Section 1 of the Constitution of the United States and Article III, Section 1 of the Constitution of the State of New York. This act of judicial legislation by the said Appellate Court and the application thereof to the *Childs* case is arbitrary and capricious and constitutes a violation of the rights of Appellant to due process under the Fourteenth Amendment to the Constitution of the United States. See, *Caldwell* v. *Texas,* 237 U.S. 692, 697, 11 S.Ct. 224 (1891); *Rabe* v. *Washington,* 405 U.S. 313, 92 S.Ct. 933, Reh. Den., 406 U.S. 911, 92 S.Ct. 1604 (1972); *Bouie* v. *City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697 (1964).

IV

The New York Appellate Court engaged in judicial legislation in its Decision and Order dated July 11, 1979 by rewriting Section 237(b) and Section 244 of the New York Domestic Relations Law ignoring legislative intent and the clear meaning of the words in the statutes, and therefore, acted in an arbitrary and capricious manner in violation of the rights of the appellant under the due process of the law and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This Court in *Orr* v. *Orr, supra,* held the Alabama statutes unconstitutional as being gender-based where alimony could only be paid by the husband to the wife. No attempt was made by this Court to change or construe the meaning of the words "husband" or "wife".

Upon remand of the *Childs* case in the prior appeal to this Court, the Appellate Court of the State of New York, Second Judicial Department, determined Section 237(b) of the New York Domestic Relations Law to be constitutional by substituting the word "spouse" for "wife" and "husband" in such statute. Similarly, it found Section 244 of the New York Domestic Relations Law to be constitutional by making a similar substitution. As a result of this construction, "wife" now means "spouse" and "husband" now means "spouse" in these two statutes as applied and enforced in the Second Judicial department of the State of New York.

But, we cannot be certain of this! The same Appellate Court that rendered the Decision and Order in the *Childs* case dated July 11, 1979 (App. B, p. 5a), on December 10, 1979 rendered another decision in *Greschler* v. *Greschler, supra,* which determined Section 5-311 of the New York General Obligations Law to be unconstitutional. This Section of the General Obligations Law unconditionally bars a wife from renouncing support from her husband, while conditioning a husband's right to renounce support from his wife. There was no attempt to construe "wife" and "husband" to mean "spouse" as it did in the *Childs* case. It disarmingly endeavored to distinguish the two decisions by stating that it was unable to discern legislative intent sufficient to sustain a judicial reconstruction of the statute.

Again, the Supreme Court of the State of New York, Second Judicial Department on November 19, 1979 in *Lebensfeld* v. *Lebensfeld,* —— A.D.2d —— 421 N.Y.S.2d 615, while indicating that Section 412 of the Family Court Act of the State of New York which provides that "a husband is chargeable with the support of his wife" falls within the proscription of *Orr,* nevertheless construed that statute to be constitutional "since we deem it to

authorize support for either spouse on a gender-neutral basis only (cf. *Childs* v. *Childs,* 69 A.D.2d 406)." In this case the same Appellate Court construed "wife" and "husband" to mean "spouse" in both cases, as it had done in the *Childs* case.

In *Caban* v. *Mohammed,* No. 77-6431, *supra,* the Supreme Court of the United States held Section 111, subdivision 1(c) of the New York Domestic Relations Law to be unconstitutional as being in violation of the Equal Protection Clause of the Fourteenth Amendment. This provision of the New York Domestic Relations Law permitted an unwed mother but not an unwed father to block adoption of an illegitimate child. This Court read the statute as it was written and enacted by the New York Legislature and found it to constitute gender-based discrimination. This Court did not endeavor to construe "mother" to mean "mother or father" or "father" to mean "father or mother", but read the statute as written and enacted by the New York State Legislature and found it to constitute gender-based discrimination, and, therefore, to be unconstitutional.

Insofar as the said Appellate Court asserts that it is effectuating legislative intent there is no basis in law or in fact for such assertion. Section 237(b) of the New York Domestic Relations Law was enacted by *New York Laws 1962,* Chap. 313, and as originally enacted provided that only the wife could compel the payment of her counsel fees by the husband, and was so construed and applied by the Courts of the State of New York until 1979—a period of seventeen years. Section 237(b) of the New York Domestic Relations Law was amended in 1978 effective thirty days after June 19, 1978 by *New York Laws 1978* Chap. 444, Section 1, and no attempt was made to change the wording of the statute to make it gender-neutral; although Section 238 of the New York Domestic Relations Law was amended in the same session of the New York State Legislature effective July 28, 1978 by *New York Laws 1978,* Chap. 529, Section 1, so as to make it gender-neutral. In addition, identical bills were submitted to the New York Assembly and the New York State Senate on May 23, 1979 which among other amendments proposed amendments to both Sections 237(b) and 244 of the New York Domestic Relations Law which would make said Sections gender-neutral. The bill passed the New York Assembly on June 13, 1979, but the Senate bill was referred to the New York Senate Judiciary Committee on June 20, 1979. The bill was not reported out of the New York Senate Judiciary Committee and died in said Committee. *New York Legislative Record and Index 1979,* Pages S458, S459 and A442. It is certainly clear that there is no legislative purpose expressed which the said New York Appellate Court can use as a basis for rewriting Sections 237(b) and 244 by judicial fiat. In fact, the expressed legislative intent is for the *status quo.*

As a result of the cases stated above, it is evident that, at least in the Second Judicial Department of the State of New York, "wife" can mean a "married woman" (its commonly accepted meaning) in one case, and can mean "spouse", that is a "married man or a married woman," in another case; and a "husband" can mean a "married man" (its commonly accepted meaning) in one case, and can mean "spouse", a "married man or a married woman" in another case. The meaning all depends upon the whims and caprice of the particular Court and its judges. There is no contention, or authority for the contention, that the New York State Legislature delegated its legislative powers to the New York Courts—specifically the Appellate Division of the New York Supreme Court, Second Judicial Department. The said New York Appellate Court has no right and no authority under the Constitution of the State of New York to draft and enact a completely

new gender-neutral law, as it did by its Decision and Order dated July 11, 1979 (App. B, p. 5a). Article III, Section 1 of the Constitution of the State of New York.

The application of the law in this manner is arbitrary and capricious and unequal. It constitutes the refusal of the Appellate Court to follow the law as enacted by the New York State Legislature. The law as so enacted and applied in Appellant's case, deprives Appellant of rights granted under the due process and Equal Protection Clause of the Fourteenth Amendment. See, *Standard Computing Scale Company Limited* v. *Farrell,* 249 U.S. 571, 577, 39 S. Ct. 380 (1919); *Norton* v. *Shelby County,* 118 U.S. 425 (1885); *Leeper* v. *Texas,* 139 U.S. 462, 11 S. Ct. 577 (1891).

In the Fourteenth Amendment, due process of the law refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, as expressed by the legislature of the State. In *Hurtado* v. *California,* 110 U.S. 516 (1884), this Court indicates the limitations imposed by the due process on the laws of the States:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person, or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' * * *" PP. 535-6.

V

Sections 237(b) and 244 of the New York Domestic Relations Law are clearly unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in light of *Orr* v. *Orr*, and are, therefore, inoperative as if never written and enacted and are null and void *ab initio*.

The New York Appellate Court (in its Decision and Order dated July 11, 1979) in the light of *Orr* v. *Orr* properly held Section 237(b) and 244 of the New York Domestic Relations Law to be unconstitutional. The said Appellate Court then attempted by judicial legislation to avoid such unconstitutionality and thereupon declared said statutes to be constitutional and that such construction of constitutionality was to "have prospective effect only in proceedings pending on the date of the *Orr* decision, March 5, 1979," (App. B, p. 5a).

The award of counsel fees and the granting of judgment in the *Childs* case (App. E, p. 31a, and App. D, p. 26a) all occurred prior to March 5, 1979. It is the contention of Appellant that the attempt by the Appellate Court to salvage the constitutionality of these two statutes by prohibited judicial legislation is ineffective and invalid. The said New York statutes are unconstitutional and therefore null and void *ab initio*. The question in this case involving the said statutes which was passed on by the said Appellate Court in its Decision and Order dated July 11, 1979 (App. B, p. 5a) and raised on this appeal is not just a change in the law or its meaning, but the most fundamental of all questions, the constitutionality of these laws. It is the most fundamental question of all. There is no doubt whatsoever that an unconstitutional statute prospectively has no force and effect and is invalid and void.

Legislation determined to be unconstitutional by this Court has been held to be void *ab initio.*

In *Greschler* v. *Greschler, supra,* the Appellate Court, Second Judicial Department, determined the statute to be unconstitutional and refused to declare the separation agreement entered into on August 22, 1975 void because it violated the statute (Section 5-311 of the New York General Obligations Law), stating that it "cannot do so if the statute itself is unconstitutional." 422 N.Y.S.2d 718, 723. The court reached back four years to validate the pre-existing separation agreement based upon its declaring unconstitutional the statute, under which the agreement otherwise would have been void and unenforceable.

An unconstitutional act is considered to be no law at all and is inoperative as if it had never been passed. *Chicago, Indianapolis & Louisville Ry. Co.* v. *Hackett,* 228 U.S. 559, 33 S.Ct. 581 (1913); *Ex parte Siebold,* 100 U.S. 371, 376 (1879). This Court in *Norton* v. *Shelby County, supra,* explicitly states this rule:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." P. 442.

The New York Appellate Court in its Decision and Order dated July 11, 1979 (App. B, p. 5a) attempts to avoid the unconstitutional effect as declared by this Court by implying its own interpretation thereby declaring the statutes to be valid and enforceable. Such a procedure by the Appellate Court effectively reverses and overrules the decision of this Court on the prior appeal and is not permissible. One of the substantial federal questions presented on this appeal is whether the unconstitutional New York statutes are inoperative as if never written and enacted and are null and void *ab initio.*

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code, and probable jurisdiction should be noted.

Respectfully submitted,

THEODORE Q. CHILDS
Attorney for Appellant (*Pro Se*)
150 Broadway
New York, New York 10038

APPENDIX A.

Order of the Supreme Court of the United States, Dated January 7, 1980, Denying Motion for Leave to File Petition for Writ of Mandamus.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

Washington, D. C. 20543

January 7, 1980

Theodore Q. Childs
Farber & Childs
150 Broadway
New York, NY 10038

RE: Theodore Q. Childs
v. Appellate Division of the Supreme Court of New York, Second Judicial Department, *et al.*
No. 79-676

Dear Mr. Childs:

The Court today entered the following order in the above-entitled case:

The motion for leave to file a petition for writ of mandamus is denied.

Very truly yours,

MICHAEL RODAK, JR.
Clerk

APPENDIX B.

Order and Memorandum Decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated December 3, 1979.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on December 3, 1979.

Hon. Frank D. O'Connor
Justice Presiding
Hon. Leon D. Lazer
Hon. Guy J. Mangano
Hon. Frank A. Gulotta
Associate Justices

LUCY GRANT CHILDS,

Respondent,

v.

THEODORE Q. CHILDS,

Appellant.

In the above entitled cause, the above named Theodore Q. Childs, appellant, having moved for leave to appeal to the Court of Appeals from the order of this court, dated July 11, 1979, which determined the appeal from two orders of the Supreme Court, Westchester County, dated December 30, 1976 and July 11, 1978, respectively;

Order and Memorandum Decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated December 3, 1979

Now, upon the papers filed in support of said motion and no papers have filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is;

ORDERED that the motion is hereby denied (see CPLR 5602, subd [b], par [1]).

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

No. 6690 ms

Lucy Grant Childs, Respondent,
v. Theodore Q. Childs, Appellant.

Motion by appellant for leave to appeal to the Court of Appeals from the order of this Court dated July 11, 1979, which determined the appeal from two orders of the Supreme Court, Westchester County, dated December 30, 1976 and July 11, 1978, respectively.
Motion denied (see CPLR 5602, subd [b], par [1]).

O'CONNOR, J.P., LAZER, MANGANO and GULOTTA, J J., concur

Order and Memorandum Decision of the Court of Appeals, State of New York, Dated October 9, 1979.

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of October A.D. 1979

Present,

HON. LAWRENCE H. COOKE, Chief Judge, presiding.

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2 Mo. No. 877 SSD 89

LUCY GANT CHILDS,

Appellant-Respondent,

vs.

THEODORE Q. CHILDS,

Respondent-Appellant.

The appellant-respondent and respondent-appellant having filed notices of appeal and cross-appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal and cross-appeal be and the same hereby are dismissed without costs, by the Court *sua sponte,* upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

JOSEPH W. BELLACOSA
Clerk of the Court

Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated July 11, 1979, 69 A. D. 2d 406, 419 N. Y. S. 2d 533.

July 11, 1979

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

O'Connor, J.P., Lazer, Gulotta and Mangano, JJ.

LUCY GANT CHILDS,

Respondent,

against

THEODORE Q. CHILDS,

Appellant.

APPEALS from (1) so much of an order of the Supreme Court at Special Term (James R. Caruso, J.), dated December 30, 1976 and entered in Westchester County, as awarded plaintiff a counsel fee of $12,000, plus disbursements, and (2) a further order of the same court (Anthony J. Ferraro, J.), dated July 11, 1978, which, *inter alia,* granted plaintiff's application for a money judgment for arrears in the payment of counsel fees. (By order dated March 19, 1979, the Supreme Court of the United States "vacated" the order of this court which had modified the order dated December 30, 1976 [60 A. D. 2d 638] and remanded the case to this court for further consideration in light of *Orr v. Orr,* 440 U. S. [99 S. Ct. 1102].)

Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated July 11, 1979, 69 A. D. 2d 406, 419 N. Y. S. 2d 533

John J. Von Der Lieth, New York, N. Y., for appellant and appellant *pro se.*

Lans Feinberg & Cohen, New York, N. Y. (Deborah E. Lans and Robert Stephan Cohen of counsel), for respondent.

Robert Abrams, Attorney-General, New York, N. Y. (Robert J. Schack and George D. Zuckerman of counsel), appearing pursuant to Executive Law, §71.

O'Connor, J. P.:

We are called upon by the Supreme Court of the United States to review a previous decision of this court in light of *Orr v. Orr* (440 U. S. [99 S. Ct. 1102]) (see *Childs v. Childs,* 60 A. D. 2d 639, mot. to dismiss app. granted 43 N. Y. 2d 946, revd. 440 U. S. [99 S. Ct. 1488]). This in turn requires us to test the constitutionality of section 237 of the Domestic Relations Law under a post-*Orr* light. We hold that the statute is constitutional insofar as it authorizes the trial court to award counsel fees to either party on a gender-neutral, needs-only basis. We further hold that this construction of the Domestic Relations Law shall be prospective only to proceedings and applications pending on March 5, 1979, the date of the *Orr* decision.

I

The facts, other than conflicting allegations of financial worth, are essentially not in dispute. The parties were married in 1955 and divorced in July, 1974 pursuant to a judgment of the Supreme Court, Westchester County.

Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated July 11, 1979, 69 A. D. 2d 406, 419 N. Y. S. 2d 533

Four children were born during the marriage: three sons, presently 23, 12 and 10 years old, respectively; and one daughter, presently 21 years old. By stipulation, the two older children remained with the defendant father, while the two younger sons remained in the plaintiff mother's custody in the marital home in Scarsdale, New York, subject to the defendant's visitation rights. The underlying proceeding which triggered the present controversy was a contested postdivorce custody proceeding commenced by the defendant in the Supreme Court, Westchester County. It appears that in December, 1975, the plaintiff mother, without any notice to or consent of the defendant father, vacated the marital residence with the two youngest children and moved to Chapel Hill, North Carolina. Since this had the effect of frustrating the defendant's visitation rights, he immediately moved to modify the judgment of divorce so as to obtain custody of these two children. There followed a plenary hearing lasting some 20 days at which numerous witnesses, both lay and medical, testified. An application was also made by the plaintiff, during the proceeding, for counsel fees. The defendant husband, however, did not cross-apply for counsel fees. While the defendant ultimately succeeded in obtaining custody of the two youngest boys, the trial court (Caruso, J.), in an order dated December 30, 1976, nevertheless awarded the plaintiff counsel fees of $12,000 and disbursements of $1,500.

The defendant thereupon appealed to this court, arguing for the first time that section 237 of the Domestic Relations Law was unconstitutional as violative of the equal protection clause (citing, *inter alia, Frontiero v. Richardson,* 411 U. S. 677 and *Reed v. Reed,* 404 U. S. 71). This court, in a decision dated December 27, 1977 (60 A.

D. 2d 639), refused to reach the constitutional question upon the ground that "[a]ppellant, having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute (see 8 N. Y. Jur, Constitutional Law, §50)." At the same time, however, this court afforded the defendant some relief by reducing the award of counsel fees to $5,000, plus disbursements.

Aggrieved, the defendant appealed to the Court of Appeals. On February 22, 1978 that court dismissed the appeal on the ground, *inter alia,* that "no substantial constitutional question is directly involved" (43 N. Y. 2d 946, 947). Still aggrieved, the defendant filed a petition for certiorari to the Supreme Court of the United States.

While the defendant was pursuing his appellate review channels, the plaintiff was proceeding with enforcement remedies. Upon the defendant's failure to pay the reduced award, the plaintiff moved in May, 1978, pursuant to section 244 of the Domestic Relations Law, for the entry of a judgment for $6,500 representing arrears of counsel fees plus disbursements. In opposition, the defendant sought to relitigate the propriety of the award of counsel fees previously reviewed by this court; specifically, he stated that the award was unjust because his wife had assets of $464,000 while he earned only $19,000 per year and had a net debt of some $50,000. The defendant also requested a stay of entry of a judgment pending further appeals. The court (Ferraro, J.), by an order dated July 11, 1978, granted the plaintiff's application for a judgment of $6,500 while denying the defendant's application for a stay.

Meanwhile, the defendant's appeal to the Supreme Court of the United States on the underlying order awarding counsel fees (i.e., 60 A. D. 2d 639, mot. to dismiss app. granted 43 N. Y. 2d 946, *supra*), was slowly winding its

way through channels. On March 5, 1979 the celebrated case of *Orr v. Orr* (440 U. S. [99 S. Ct. 1102]) was decided, striking down an Alabama statutory scheme similar to New York's, as violative of the equal protection clause of the Constitution. On March 19, 1979 the Supreme Court of the United States granted the *Childs* petition for writ of certiorari, vacated the previous order of this court and "remanded [the case] to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for further consideration in light of *Orr v. Orr,* 440 U. S. " (*Childs v. Childs,* 440 U. S. [99 S. Ct. 1488], *supra*). The State Attorney-General has been given permission to intervene (see Executive Law, §71) and, at this time, both the appeal from the order granting a judgment of $6,500, and the remand from the Supreme Court of the United States on the constitutionality of section 237 are before this court.

II

Analysis must commence with a statement of the law as it presently exists:

> "§237. Counsel fees and expenses
>
> "(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a

divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, *the court may direct the husband,* or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, *to pay such sum or sums of money directly to the wife's attorney to enable the wife to carrry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.* Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment. Upon application of the husband or the wife or the person or persons maintaining an action for annulment after the death of the husband, upon such notice to the other party and given in such manner as the court shall direct, the court may, in or before final judgment, annul or modify any such direction. Subject to the provisions of section two hundred forty-four of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in his own name in the same proceeding.

"(b) *Upon any application to annul or modify an order or judgment* for alimony or for custody,

visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, *the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.* With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in counsel's own name in the same proceeding" (emphasis supplied).

"§238. Expenses in enforcement proceedings

"In any action or proceeding to compel the payment of any sum of money required to be paid by a judgment or order entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six, the court may in its discretion require either party to pay the expenses of the other in bringing, carrying on, or defending such action or proceeding. *In any such action or proceeding, applications for counsel fees and expenses may be maintained* by the

attorney for the respective parties in counsel's own name and in counsel's own behalf" (emphasis supplied).

"§244. Enforcement by execution of judgment or order in action for divorce, separation or annulment

"Where the husband in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, *makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such part thereof as justice requires having a regard to the circumstances of the respective parties,* together with ten dollars costs and disbursements. The application for such order shall be upon such notice to the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy, including but not limited to the remedy provided pursuant to the provisions of section forty-nine-b of the personal property law, to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry

of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered" (emphasis supplied).

The focus of our inquiry is, of course, the Supreme Court's decision in *Orr v. Orr (supra)* and its impact on the foregoing laws. The Alabama statutory scheme construed was quite similar to that of New York's inasmuch as, by statute, Alabama likewise permitted alimony to be granted only to wives, never to husbands (see *Orr v. Orr, supra,* p. 1107, n. 1, citing, Ala. Code, tit. 30, §30-2-51, *et seq.*). As far as we are concerned, *Orr* is noteworthy for its analysis of standing in addition to its examination of the underlying equal protection considerations. The threshold issue of standing is relevant here because, in the December, 1977 order, this court disposed of the constitutional attack on standing grounds, i.e., the "[a]ppellant, having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute" (60 A. D. 2d 639, *supra*). In *Orr* it was urged that the defendant lacked standing because he "made no claim that he was entitled to an award of alimony from Mrs. Orr, but only that he should not be required to pay alimony if similarly situated wives could not be ordered to pay. It is therefore possible that his success here will not ultimately bring him relief from the judgment outstanding against him" (*Orr v. Orr,* 99 S. Ct. at pp. 1107-1108, *supra*). Mr. Justice Brennan, speaking for a six-member majority, however, failed to find this argument persuasive (*supra*, p. 1108):

"In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy

> the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties • • • In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia,* amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties • • • [I]f • • • the State takes the second course and denies alimony to both spouses, it is Mr. Orr and not the hypothetical plaintiff who would benefit • • •
>
> "There is no question but that Mr. Orr bears a burden he would not bear were he female • • •. The burden alone is sufficient to establish standing. Our resolution of a statute's constitutionality often does 'not finally resolve the controversy between th[e] appellant and th[e] appellee,' *Stanton v. Stanton* [421 U. S. 17]. We do not deny standing simply because the 'appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit.' *Id.,* at 18."

Similarly, in the instant case, the fact that the defendant may not ultimately succeed in obtaining the sought-after relief when tested against purely objective economic criteria is legally insignificant from the point of view of standing. Nor may the defendant's failure to request a counsel fee in the original custody proceeding be considered any longer a fatal impediment to standing, despite this court's earlier conclusion to that effect. The gravity of the issue being beyond doubt in light of *Orr,* this court may reconsider the question upon remand despite the failure to request such an award or even raise the issue at trial (cf. *Matter of Niagara Wheatfield*

Administrators Assn. [*Niagara Wheatfield Cent. School Dist.*], 44 N. Y. 2d 68, 72). In any event, were we to affirm the order upon remand from the Supreme Court upon the ground that the defendant's failure to raise any equal protection infirmity before the trial court constituted an adequate State ground for such affirmance (see *Orr v. Orr,* 99 S. Ct. at p. 1109, *supra;* cf. *Henry v. Mississippi,* 379 U. S. 443, 446), the defendant would still possess the requisite standing to attack the constitutionality of the statutory scheme. This follows because the defendant affirmatively requested counsel fees during the *subsequent* enforcement proceeding in May, 1978. Consequently, at no time has appellate scrutiny of sections 238 and 244 of the Domestic Relations Law been impaired.

Having disposed of the threshold procedural objections, the Supreme Court turned its attention to the equal protection problem itself. The court held that the Alabama statutory scheme of imposing alimony obligations on husbands but not wives violated the equal protection clause of the Fourteenth Amendment. "'To withstand scrutiny' under the equal protection clause, '" classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"'" (*Orr v. Orr,* 99 S. Ct. at p. 1111, citing *Califano v. Webster,* 430 U. S. 313, 316-317). Alimony is, in principle, a valid governmental objective because it seeks to assist needy spouses. However, no statutory scheme may be upheld on the basis of the State's preference for an allocation of family responsibility under which the wife plays merely a submissive, dependent role. "[T]he 'old notion' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis

of gender. 'No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas'" (*Orr v. Orr,* 99 S. Ct. at p. 1112, citing *Stanton v. Stanton,* 421 U. S. 7, 10, 14-15; see, also, *Craig v. Boren,* 429 U. S. 190, 198). Putting it another way, while providing for alimony is a valid legislative action, *gender* could no longer provide an accurate index of need, or an "'accurate proxy'" (*Orr v. Orr,* 99 S. Ct. at 112, citing *Craig v. Boren, supra,* p. 204; see, also, *Reed v. Reed,* 404 U. S. 71, 76, *supra*). Since the parties' finances were *already* required to be considered by the Alabama statutory scheme before any trial court determination (*Orr v. Orr, supra,* p. 1113), it logically followed that any "'gender-based distinction is gratuitous'" (*id., citing Weinberger v. Wiensenfeld,* 420 U. S. 636, 653). Accordingly, the Supreme Court concluded that any classification based purely on gender was irrational from an equal protection point of view, and the underlying statutory scheme unconstitutional.

III.

Having examined the constitutional underpinnings of *Orr,* there can be no doubt that sections 237 and 244 of the Domestic Relations Law, with their present gender predicates, must likewise fall under the prohibition of equal protection principles. Section 238 of the Domestic Relations Law, as recently amended to provide for counsel fees to either spouse, is, however, constitutionally permissible. It matters not that our inquiry is addressed to statutes which authorize counsel fees to wives only, and not alimony obligations. Like the Alabama statute

which was stricken, section 237 of the Domestic Relations Law is designed to assist needy wives and guarantee their ability to bring matrimonial actions unimpeded by monetary obstacles; on its face, the statute is specifically conceived "to enable the wife to carry on or defend the action or proceeding" (Domestic Relations Law, §237, subd. [a]; see *Emmer v. Emmer,* A. D. 2d [2nd Dept., dec. April 16, 1979], citing *Martin v. Martin,* 28 A. D. 2d 897; *Zang v. Zang,* 63 A. D. 2d 561, citing *Kann v. Kann,* 38 A. D. 2d 545; *LaPorte v. LaPorte,* 60 A. D. 2d 966 [Appeal No. 2]; *Ross v. Ross,* 47 A. D. 2d 866; *Winter v. Winter,* 39 A. D. 2d 69, 71-72, affd. 31 N. Y. 2d 983; see, also, 11B Zett-Edmonds-Schwartz, N. Y. Civ. Prac., §38.06[1], p. 38.65). Without repeating the equal protection argument verbatim, *Orr* makes it readily apparent that New York's statutory scheme of granting counsel fees purely as a function of gender is irrational and cannot stand. As the Court of Appeals observed with respect to the analogous setting of a section of the Family Court Act which subjected girls to a Person in Need of Supervision (PINS) adjudication until the age of 18, while simultaneously affording immunity to boys from such liability after the age of 16, "since there is no justification for the age-sex distinction so much of section 712 (subd. [b]) of the Family Court Act as encompasses females between the ages of 16 and 18 must be stricken as unconstitutional" (*Matter of Patricia A.,* 31 N. Y. 2d 83, 89; see, also, *Seidenberg v. McSorley's Old Ale House, Inc.,* 308 F. Supp. 1253, 1259-1260). Since New York's statutory scheme presently requires the trial court to take into consideration the respective finances of the parties before making a determination of counsel fees (see Domestic Relations Law, §§ 237, 250, cf. *Garrel v. Garrel,*

59 A. D. 2d 885), it logically follows that "'the gender-based distinction is gratuitous'" (*Orr v. Orr,* 99 S. Ct. at p. 1113, *supra,* citing *Weinberger v. Wiesenfeld,* 420 U. S. 636, 653, *supra*); that is to say, the purpose of the legislation will be satisfied based purely on objective economic criteria and without resort to any impermissible gender classification. The conclusion that New York's statutory scheme is unconstitutional insofar as it is predicated on gender is not novel. In *Thaler v. Thaler* (89 Misc. 2d 315, 319-325, revd on other grounds 58 A. D. 2d 890), Mr. Justice Harnett reasoned that sections 236 and 237 of the Domestic Relations Law were violative of the equal protection clause based upon an analysis quite similar to that of Orr. Other trial Courts have reached similar conclusions in the wake of *Orr*[1]. It is important to note, however, despite the patent invalidity of sections 237 and 244, that section 238 of the Domestic Relations Law, as amended in 1978, is perfectly constitutional within the strictures of *Orr.* This follows because the statute presently authorizes the trial court to "require *either party to pay the expenses of the other* in bringing, carrying on, or defending such" an enforcement proceeding, including specifically counsel fees (emphasis added).

IV.

Although sections 237 and 244 of the Domestic Relations Law as presently drafted fall within the proscription of *Orr,* yet it does not necessarily follow that they

[1]See *Laka v. Laka,* N.Y.L.J., March 20, 1979, p. 12, col. 2; *Levy v. Levy,* N.Y.L.J., April 19, 1979, p. 13, col. 5; *Robson v. Robson,* N.Y.L.J., March 27, 1979, p. 6, col. 6; cf. *Matter of Roth,* N.Y.L.J., March 27, 1979, p. 12, col. 5.

must be deemed irrevocably unconstitutional and annulled. We are cognizant of the argument that, counsel fees being a creature of statute and unknown to the common law, such an infirmity as discerned here leaves this court powerless to resurrect the authority to award counsel fees absent new and constitutional legislative action (see *Lambert v. Lambert,* 45 A. D. 2d 715, citing *Silbert v. Silbert,* 22 A. D. 2d 893, affd. 16 N. Y. 2d 564 and *Blaine v. Blaine,* 20 A. D. 2d 903; cf. *Sharrock v. Dell Buick-Cadillac,* 45 N. Y. 2d 152, 166-167).[2] But an appellate court has an obligation to pursue every reasonable path of reconciliation of the challenged statute consonant with the Constitution, rather than setting it aside. In this regard, it is commonly said that every presumption in favor of the statute will be indulged, every effort made to construe ambiguous language so as not to conflict with fundamental law (see, e. g., *Marcus Assoc. v. Town of Huntington,* 45 N. Y. 2d 501, 505, citing *Lighthouse Shores v. Town of Islip,* 41 N. Y. 2d 7, 11; *Matter of Carter v. Carter,* 58 A. D. 2d 438, 445-446 [opn. by Shapiro, J.], citing *Hirson v. United States Corp.,* 263 App. Div. 646, 650, affd. 289 N. Y. 564; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes, §150, subd. c). And while courts traditionally refrain from construing a challenged statute in such a way so as to "expand" or add to the language, as opposed to merely excising from it (see *Matter of Malpica-Orsini,* 36 N. Y. 2d 568, 571, app. dsmd. 423 U. S. 1042), nevertheless, under appropriate circumstances, a court may read a statute expansively, or in tandem with other statutes, so as to prevent serious

[2]For cases where this argument was made, see *Levy v. Levy,* N.Y.L.J., April 19, 1979, p. 13, col. 5; *Robson v. Robson,* N.Y.L.J., March 27, 1979, p. 6, col. 6.

damage to overriding public policy (see *Welsh v. United States,* 398 U. S. 333, 355-356 [Harlan, J., concurring]). Without such an expansive reading in the instant case, the orderly processes by which indigent spouses seek legal recourse would come to a halt producing extremely inequitable circumstances, totally unforeseen by the Legislature. As Mr. Justice Harnett pointed out in *Thaler* (89 Misc. 2d 315, 328, *supra*), with respect to the possible elimination of alimony: "Total elimination of alimony would produce a much greater shock to the legislative design than spreading its availability to all dependent spouses * * *. It would be a totally inappropriate response to the problem at hand." While suspending the authorization to grant counsel fees would have an impact of lesser severity than the suspension of alimony, the principle is the same. Public policy encourages the equitable resolution of matrimonial disputes (see, e. g., *Kay v. Kay,* 37 N. Y. 2d 632, 637). Accordingly, this court construes sections 237 and 244 of the Domestic Relations Laws as constitutional since we deem them to authorize counsel fees to either spouse on a gender-neutral, needs-basis only. Such a construction is consistent with the traditional rule that where a statute has been found to violate the equal protection clause, courts will traditionally read into it the improperly excluded class (see, e. g., *Califano v. Westcott,* U. S. [47 U.S.L.W. 4817, 4821] [aid to dependent children benefits]; *Califano v. Goldfarb,* 430 U. S. 199 [Social Security Act survivorship benefits]; *Weinberger v. Wiesenfeld,* 420 U. S. 636, *supra* [same]; *Frontiero v. Richardson,* 411 U. S. 677, *supra* [armed forces fringe benefits]; *Levy v. Louisiana,* 391 U. S. 68 [wrongful death actions]; *Matter of Passante v. Walden Printing Co.,* 53 A. D. 2d 8, 13 [worker's compensation survivorship benefits]). Furthermore, there is precedent for reading other statutes in tandem for the purpose of resisting constitutional challenges (see *Matter of Carter v. Carter,* 58 A. D. 2d 438, 446, *supra* [Family Ct. Act, §§ 413, 414 read in tandem]; see, also, *Tessler v. Siegel,* 59 A. D. 2d 846 [same]). In the instant case, section 238 of the Domestic Relations Law presently allows the trial court to require either party to pay the expenses of the other, including counsel fees. This statute, therefore, provides on its face a statutory mechanism by which the trial court may award counsel fees to the husband in a limited proceeding. Additional authority is found in CPLR 8303 (subd. [a], par. 2), which provides for the granting by the court of a "discretionary allowance * * * to any party to a difficult or extraordinary case, where a defense has been interposed." It has been suggested by the Attorney-General that since "[n]o precedent has been found for the instant situation," applications for counsel fees for husbands are consequently "extraordinary" within the meaning of the statute. By resort to either of the foregoing statutes, sections 237 and 244 of the Domestic Relations Law can be constitutionally read as substituting the word "spouse" for "wife."

V.

Finally, we address ourselves to the issue of retroactivity. We hold that our construction of these statutes shall have prospective effect only in proceedings pending on the date of the *Orr* decision, March 5, 1979. All other awards of counsel fees which had been conclusively adjudicated as of that date shall not be affected by our holding today. There exists no constitutional impedi-

ment to applying changes in law only in cases pending as of the date of such decision (see *New York Public Interest Research Group v. Steingut,* 40 N. Y. 2d 250, 260-261, citing *Hurd v. City of Buffalo,* 41 A. D. 2d 402, 405, affd. 34 N. Y. 2d 628; *Incorporated Vil. of Northport v. Guardian Fed. Sav. & Loan Assn.,* 87 Misc. 2d 344, 348-350 [Lazer, J.], affd. 54 A. D. 2d 893; cf. *Matter of Gowan v. Tully,* 45 N. Y. 2d 32, 34). The Supreme Court of the United States in *Chevron Oil Co. v. Huson* (404 U. S. 97, 106-107) observed that there are three factors to consider in deciding the issue of retroactivity: (1) does the decision establish a "new principle of law, either by overruling clear past precedent on which litigants may have relied • • • or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) does an examination of the prior history indicate " 'whether retrospective operation will further or retard its operation' "; and (3) does it appear that the decision " 'could produce substantial inequitable result if applied retroactively.' " With respect to the *Orr* decision, it cannot be doubted that it overruled clear past precedent relied upon ceaselessly and that retroactive application prior to March 5, 1979 would produce chaotic, inequitable results (see, also, *Laka v. Laka,* N.Y.L.J., March 20, 1979, p. 12. col. 3).

VI.

Accordingly, the matter must be remitted to the trial court for a hearing *de novo.* At such a hearing, both parties may apply for counsel fees. The trial court will make a decision *de novo* as, in the court's discretion,

justice requires, having regard to the economic needs of both parties and the circumstances of the case.

Lazer, Gulotta and Mangano, JJ., concur in the opinion of Mr. Justice O'Connor.

B/mc

Frank D. O'Connor, J. P.
Leon D. Lazer
Frank A. Gulotta
Guy J. Mangano, JJ.

———AD2d———

A—June 19, 1979

2749 E/77
926 E Lucy Gant Childs, respondent,
E v. Theodore Q. Childs, appellant.

John J. Von Der Lieth, New York, N. Y., for appellant and appellant *pro se.*

Lans Feinberg & Cohen, New York, N. Y. (Deborah E. Lans and Robert Stephan Cohen of counsel), for respondent.

Robert Abrams, Attorney-General, New York, N. Y. (Robert J. Schack and George D. Zuckerman of counsel), appearing pursuant to Executive Law, §71.

Appeal by the defendant husband from (1) so much of an order of the Supreme Court, Westchester County (CARUSO, J.), dated December 30, 1976, as awarded plaintiff a counsel fee of $12,000, plus disbursements, and (2) a further order of the same court (FERRARO, J.), dated July 11, 1978, which, *inter alia,* granted plaintiff's application for a money judgment for arrears in the payment of counsel fees.

Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated July 11, 1979, 69 A. D. 2d 406, 419 N. Y. S. 2d 533

By order dated December 27, 1977, this court modified the order dated December 30, 1976 by reducing the counsel fee and, as so modified, affirmed the said order (60 AD 2d 639). On February 22, 1978, the Court of Appeals dismissed the appeal to that court (43 NY2d 946). On March 19, 1979 the Supreme Court of the United States "vacated" the order of this court and remitted the case to this court "for further consideration in light of *Orr v. Orr*" (440 US.....[99 S Ct 1102]) (440 US.....[99 S Ct 1488]).

Order dated December 30, 1976 reversed insofar as appealed from, without costs or disbursements.

Order dated July 11, 1978 modified by deleting therefrom the provision which granted plaintiff's application for a judgment representing arrears in counsel fees. As so modified, said order affirmed, without costs or disbursements.

This case is remitted to the Supreme Court, Westchester County, for further proceedings in accordance with the opinion herein.

Opinion by O'Connor, J. P.

Lazer, Gulotta and Mangano, JJ., concur in the opinion of Mr. Justice O'Connor.

APPENDIX C.

Opinion and Order of the Supreme Court of the United States in *Childs v. Childs*, No. 77-1653, March 19, 1979, 440 U. S. , 99 S. Ct. 1488.

No. 77-1653. Theodore Q. Childs, petitioner, v. Lucy Gant Childs.

March 19, 1979. On petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, Second Judicial Department. Petition for writ of certiorari granted, judgment vacated and case remanded to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for further consideration in light of *Orr v. Orr,* 440 U. S. , 59 L. Ed. 2d 306, 99 S. Ct. (1979). Mr. Justice Stewart dissents.

APPENDIX D.

Order and Memorandum Decision of Supreme Court, Westchester County, Dated July 11, 1978.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

LUCY GRANT CHILDS,

Plaintiff,

against

THEODORE Q. CHILDS,

Defendant.

Index No. 14276/73

FERRARO, J.

Plaintiff makes application for judgment against Defendant pursuant to §244 of the Domestic Relations Law for arrears, and payment of counsel fees, disbursements and costs amounting to $6,500.

Although Defendant has made several applications for a stay of the entry of judgment, all applications made by the Defendant have been denied.

The application is therefore granted. Submit judgment.

So ordered.

Enter

Dated: July 11, 1978

ANTHONY J. FERRARO
J. S. C.

Lans Feinberg & Cohen
Atty. for Plaintiff
555 Madison Ave. N. Y., N. Y. 10022

John J. Von Der Lieth
Atty. for Defendant
150 Broadway, N. Y., N. Y. 10038

APPENDIX E.

Order and Memorandum of the Court of Appeals of the State of New York, Dated February 22, 1978, 43 N. Y. 2d 946, 403 N. Y. S. 2d 896.

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2 Mo. No. 94

LUCY GANT CHILDS,

Respondent,

vs.

THEODORE Q. CHILDS,

Appellant.

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the grounds that appellant is not aggrieved by the modification at the Appellate Division (CPLR 5601[a][iii]), and that no substantial constitutional question is directly involved.

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated December 27, 1977, 60 A. D. 2d 639, 400 N. Y. S. 2d 356.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 27, 1977.

Hon. Henry J. Latham,
Justice Presiding,
Hon. John P. Cohalan, Jr.,
Hon. Vincent D. Damiani,
Hon. Frank D. O'Connor,
Associate Justices.

LUCY GANT CHILDS,

Respondent,

v.

THEODORE Q. CHILDS,

Appellant.

In the above entitled cause, the above named Theodore Q. Childs, defendant, having appealed to this court from so much of an order of the Supreme Court, Westchester County, dated December 30, 1976, as awarded plaintiff a counsel fee of $12,000, plus disbursements; and the said appeal having been argued by Theodore Q. Childs, Esq., *pro se,* and argued by Robert S. Cohen, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated December 27, 1977, 60 A. D. 2d 639, 400 N. Y. S. 2d 356

ORDERED that that order appealed from is hereby modified, on the facts, by reducing the award of the counsel fee to $5,000, plus disbursements; and, as so modified, the said order insofar as appealed from is unanimously affirmed, without costs or disbursements.

Enter:

.....A. D. 2d..... A—December 8, 1977

2749 E

LUCY GANT CHILDS,

Respondent,

v.

THEODORE Q. CHILDS,

Appellant.

Theodore Q. Childs, New York, N. Y. (John J. Von Der Lieth of counsel), appellant *pro se.*

Lans Feinberg & Cohen, New York, N. Y. (Robert S. Cohen, Asher B. Lans, (Deborah E. Lans and Mark J. Samuels of counsel), for respondent.

In a matrimonial action, the defendant husband appeals from so much of an order of the Supreme Court, Westchester County, dated December 30, 1976, as awarded plaintiff a counsel fee of $12,000, plus disbursements.

Order modified, on the facts, by reducing the award of the counsel fee to $5,000, plus disbursements. As so modified, order affirmed insofar as appealed from, without costs or disbursements.

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Dated December 27, 1977, 60 A. D. 2d 639, 400 N. Y. S. 2d 356

To the extent indicated herein, the counsel fee allowed was excessive. We do not reach the issue raised by appellant as to the constitutionality of subdivision (b) of section 237 of the Domestic Relations Law. Appellant, having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute (see 8 N. Y. Jur., Constitutional Law, §50).

Latham, J. P., Cohalan, Damiani and O'Connor, JJ., concur.

December 27, 1977 Childs v. Childs 2749 E

Decision and Order of the Supreme Court of New York, Westchester County, Dated December 30, 1976 (Unreported).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

LUCY GANT CHILDS,

Plaintiff,

against

THEODORE Q. CHILDS,

Defendant.

Index No. 14276/73

CARUSO, J.:

The above entitled matter presents for determination a Custody Proceeding between plaintiff (mother) and defendant (father) involving two infant children; Edward, now 10 years of age, and Russell, now 8 years of age.

The custody of the said children was awarded to the plaintiff upon a Stipulation entered into by the parties after the conclusion of the contested divorce action. The Decree of Divorce thereafter entered on or about July 9, 1974, in favor of the plaintiff and against the defendant, provided that the custody of the two infant children above named be awarded to the plaintiff and the custody of the two older children; Theodore, Jr., now 20 years of age, and Martha, now 18 years of age, be continued in the joint custody of both parties with physical custody, however, to be awarded to the defendant father. Reasonable visitation rights were directed by said Decree

to the defendant father with the infant children remaining in the custody of the said plaintiff.

The record discloses that after the termination of of the action for divorce, the said infants, Edward and Russell, continuously resided with their mother (plaintiff herein) who was then residing in the marital home at Scarsdale, New York.

It appears that prior to the divorce proceeding, the plaintiff and defendant had been living separate and apart and, at or prior to said time, the plaintiff had sought psychiatric treatment with private psychiatrists and was undergoing a course of treatment at the Westchester Jewish Community Service in the area of her home.

Without the consent or knowledge of the defendant, plaintiff decided to enter both infant children with the said Westchester Jewish Community Service for the purpose of analysis, therapy and treatment. The older brother and sister learning of this situation strenuously objected and made known their objection to ther mother; it being their considered opinion that the younger children, even though obstreperous and hostile to the mother, were not in need of psychiatric evaluation or treatment. This led to serious arguments between the older siblings and the mother and with the defendant; all of whom felt there was no need for such evaluation and psychiatric treatment. The plaintiff, whether as the result of an obsessive attitude that the conduct of the children towards her necessitated such treatment or for whatever reason, the situation led to serious complaints being made by the defendant father and older siblings both to the school officials where the children were attending and at the office of the Westchester Jewish Community Service.

The situation at the marital home became so hostile that, at a time when the daughter Martha was visiting the younger siblings at the Scarsdale home and resisted the efforts of her mother to take the children for treatment, an altercation occurred in which the mother physically bit the daughter and this, of course, has left its scar and has further estranged the older siblings in their relationship with the plaintiff mother.

The testimony indicates that the conditions at the marital home in Scarsdale were deteriorating and the plaintiff mother was obviously losing the control and affection and love of the younger siblings. The matters became so intolerable for the plaintiff mother that in late December, 1975, without any notice or consent on the part of the defendant father, she vacated the said marital premises; moved practically all of the furniture and furnishings and contents of the marital home and removed the infant children with her to Chapel Hill, North Carolina; in the vicinity where her parents and family resided.

The defendant father, believing that the children were enjoying the Christmas holiday with the mother in North Carolina, did not attempt to visit the children at the marital home until after January 1, 1976. At that time, upon approaching the Scarsdale home, he found it vacant and locked. From neighbors he learned that the plaintiff had physically removed everything from the home and that the children were with her, but the whereabouts of the children were unknown to him at the time.

The defendant thereupon made appropriate investigation and learned the whereabouts of the plaintiff and the children in Chapel Hill, North Carolina, and found out that they had, in fact, already been entered and were attending a local public school and that arrangements had been made for their admission for psychiatric treat-

Decision and Order of the Supreme Court of New York, Westchester County, Dated December 30, 1976 (Unreported)

ment in the out-patient facility of the University of North Carolina Memorial Hospital. The defendant, therefore, in order to preserve and protect his right of visitation with the children and in order to affirmatively move for the change of custody of the children under all of the circumstances proceeded to North Carolina and picked up the children after school and returned them to his home within the jurisdiction of the New York Courts. He properly and appropriately gave due notice of these facts to the Chapel Hill Police Department so that the plaintiff was immediately made aware of the whereabouts of the children.

Shortly after the return of the children to the father's home in New York City, the defendant father moved, in this Court, by Order to Show Cause, why the Judgment of Divorce entered herein should not be modified and amended so as to award him sole custody and care of the infants, Edward and Russell.

The plaintiff wife, by cross-notice of motion dated February 6, 1976, moved affirmatively to dismiss defendant's motion and sought to modify and amend the Judgment of Divorce by deleting all visitation on the part of the defendant, except day visitation only under the supervision of a qualified adult. As further relief, the plaintiff required the defendant to post a surety bond; to direct him to pay all psychiatric costs for the children not covered by Blue Cross or Major Medical policies and to direct the said defendant to pay counsel fees to be awarded to plaintiff's counsel in the Custody Proceeding.

A plenary hearing was ordered upon all of the issues framed by the pleadings and was heard before this Court, sitting without a jury, commencing on February 13, 1976, and continuing on agreed adjourned dates through 18 court days and finally concluding on October 6, 1976.

Decision and Order of the Supreme Court of New York, Westchester County, Dated December 30, 1976 (Unreported)

During the hearing, numerous witnesses, both lay and medical, testified on behalf of both parties. Many exhibits were offered in evidence on behalf of both parties. The issues were bitterly contested by able counsel who, despite the intensity and feelings of the litigants, were extremely courteous to the Court and to the witnesses who testified.

Both counsel are to be commended for the professional manner and competence displayed in presenting their respective evidence. Excellent briefs upon the facts and law were submitted by both counsel and have proved extremely helpful to the Court in reaching its decision herein.

The record herein, carefully reviewed by the Court, amply indicates that for some time prior to the divorce between these parties, there was a feeling of hostility and difficult situations existing between the mother and the four siblings. Complaints were made that the mother, for some reason, was proving inadequate to cope with the children; was a poor housekeeper; and did not provide assurance and confidence in the children and, generally speaking, had lost the control, love and affection of the children; particularly tne two older children. This was made very obvious when, at the contested divorce trial, the two older children testified against their mother . . . a most unfortunate situation but none the less undoubtedly led to a complete severance of any cordial relationship between the older children and the mother. Added to this situation were the incidents already mentioned of the mother being concerned with the hostile and angry demonstrations by the younger siblings toward her; her conclusion that this type of conduct necessitated their admission for psychiatric treatment and the undoubted influence exerted by the two older siblings on their visits to their younger brothers, all of which caused a severe emotional impact upon these two youngsters.

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There was undoubted feeling on their part that their stay with the mother was an unenjoyable episode and expressed frequently that they were happier and more content while visiting with their father and in the company of their older brother and sister. It is upon these accumulated facts that the defendant father, of necessity and in good faith, has instituted the within proceeding for the sole custody of these children with reasonable visitation rights to be accorded to the plaintiff mother.

The plaintiff, on the other hand, bitterly feels that the defendant father and her older son and daughter are the seat of her trouble with the younger siblings. She complained that they all encouraged the younger children to rebel; to be hostile; to refuse her commands and that they spoke ill of her and thereby caused the dissension which has been noted between her and the younger children. She, therefore, seeks to continue the sole custody of these young children and to permit no future visitation by the defendant father with them under the circumstances. This sharp conflict and bitter dispute between these divorced parents has presented a most difficult decision for this Court to make. Judicial history has recorded that starting with King Solomon, and down through the ages, experienced Jurists have unreservedly agreed that child custody proceedings present to a Court the most trying, sole searching, perplexing and difficult cases to decide. The instant proceeding is no exception. Upon the Court's decision and upon its insight and fairness may well rest the future and the happiness of these two young children.

In a custody proceeding arising out of a dispute between divorced parents, the law is well settled that the first and the paramount concern of the Court is and must be the welfare and the best interests of the child (Domestic Relations Law, Sections 70, 240; *Matter of Lincoln v.*

Decision and Order of the Supreme Court of New York, Westchester County, Dated December 30, 1976 (Unreported)

Lincoln, 24 N. Y. 2d, 270; *Finlay v. Finlay,* 240 N. Y., 429).

Our Court of Appeals in the recent case of *Matter of Bennett v. Jeffreys,* 40 N. Y. 2d, 543, (decided September 21, 1976), eloquently stated the controlling considerations in custody proceedings, as follows; at page 546:

> "The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude (cf. *Goss v. Lopez,* 419 US 565, 574; *Matter of Winship,* 397 US 358, 365; *Tinker v. Des Moines School Dist.,* 393 US 503, 506; *Matter of Gault,* 387 US 1, 47)."

The Court is cognizant of the law that has been clearly and well established that "There is no prima facie right to custody in either parent." (Domestic Relations Law, Section 70, 240; *Lockwood v. Jagiello,* 24 App. Div. 2d 544; *Matter of Wout,* 38 App. Div. 2d 709; *Matter of Kevin* M., 50 App. Div. 2d 959.)

The Court is further cognizant of the reluctance on the part of Courts to change custody of children unless a real and immediate need has been demonstrated to ef-

fect a change in order to preserve the welfare of the children. (*Nierenberg v. Nierenberg,* 43 App. Div. 2d 717; aff'd 36 N. Y. 2d 850; *Matter of Rodolfo "CC" v. Susan "CC",* 37 App. Div. 2d 657.)

Apropos of the above, it is also to be considered that custody of children is to be established on a long-term basis—children should not be shuttled back and forth between divorced parents merely by reason of changes in marital status or economic circumstances of the parents. The advancement of the moral, emotional and psychological adjustment of the children with a showing that the new custodial parent is better suited and "more fit" to preserve the welfare of the children must be shown. (*Matter of Lang,* 9 App. Div. 2d 401; aff'd 7 N. Y. 2d 1029; *Matter of Wout, supra.*)

The criteria, in the final analysis, to be followed is, "does the change in custody outweigh the essential principle of continued stable custody of the children." (*Obeg v. Degling,* 37 N.Y. 2d 768; *Matter of Ebert,* 38 N. Y. 2d 700.)

With these guiding principles in mind, the Court will now review the record as bearing upon "what is best for the children."

The testimony indicates that following the return of the young siblings to New York by the defendant in January, 1976, they were enrolled in and are presently attending a distinguished private school, "Rumsey Hall School," in Washington, Connecticut. The defendant selected this school as being the best for its educational and social values in order to provide the "best" for his young sons. The children are, therefore, not residing daily with either parent and see their parents only on weekends (when permitted by the School) or on School Holiday sessions.

Each parent, by court order, has had regular alternate weekly visitation with the children away from the school

(when permitted). The plaintiff has located an apartment in New York City where she now resides and the children are brought there on visitation days. The defendant has an adequate apartment for himself, his new wife (whom the children adore) and for his four children (when the two older children are home from their respective colleges). The family residence in Scarsdale has been sold by order of this Court and the net proceeds from the sale have been or will be shortly divided between the parties.

Since the children have been away from the "day to day" influence of both the parents and their older brother and sister, they have made remarkable progress in their school work; in their social relationship with other students and have been characterized by their teachers as "outstanding," "perfect gentleman," "hard workers" and "pleasant to teach." Edward, the oldest sibling, is presently a member of the Junior Football Team and has demonstrated "considerable ability with hustle and sportsmanship." Russell, the youngest sibling, is now "reading at or slightly above grade level," has shown "a high native intelligence" and "will continue to make great strides. Academically he has been a most rewarding student."

The defendant has made it clear that he intends to continue these young children in the same school which they dearly love and are so pleased with.

The Court has carefully listened to the conflicting testimony of the many medical witnesses presented by both parties. In addition, the Court has had the benefit of the confidential reports of the Probation Department and the Court-appointed psychiatrists and psychologists who conferred and examined the parents and all of the children of the parties. The "Confidential Reports" have been marked "Court's Exhibit A" and have been placed in an envelope and sealed; to be opened only by the Appellate Court upon any review of this decision.

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There was considerable testimony bearing upon the plaintiff's contention that the young siblings required and still require "psychiatric" treatment for their "emotional and behavioral problems." Upon the credible testimony adduced, this Court fails to find any support for this contention. It may well be that during and after the Divorce proceeding, these siblings suffered great "situational stress," made more intense by their being separated from the older siblings. This, in the Court's opinion, was a most unfortunate decision by these parents—but, perhaps, in the situation that existed, it was impossible to do otherwise. However, this separation of the siblings triggered the "emotional disturbance" which the plaintiff has complained of.

The infant siblings were observed by the Court on many days during the early period of the Hearing. The Court personally interviewed each of the said siblings alone and has had the benefit of speaking to them alone at length on at least four occasions.

On at least three occasions, the interviews were in the Court Chambers. Each sibling impressed the Court as physically well, alert, intelligent, well spoken, responsive and personable youngsters; well matured for their young ages. They were attending the Rumsey Hall School on each occasion and were well groomed and impeccably attired young gentlemen.

They expressed to the Court their entire satisfaction and happiness with the School and had made many friends. On the question of custody and visitation, (they being well aware of the nature of the pending proceeding between the parents), they both expressed in no uncertain terms their love and affection for both parents but a deep desire to be in the sole custody and care of their father. They stated that their visits to the father's home were interesting and happy episodes while their visits with the mother

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were unenjoyable, with too much "negative attitude" expressed by the mother.

The Court, in order to confirm the desires of these youngsters, towards the end of the Hearing invited the mother to bring the children to his home on their way back to School after a weekend with the mother. Again, upon inquiry of the youngsters—even with the mother sitting in another adjoining room—they both vigorously stated that they wanted to live with their father and with their older brother and sister, whom they both adore and for whom they have great admiration and respect. When the Court inquired as to why they felt so hostile to their mother, they, in effect, stated, "she picks on us all the time; we can't do anything; we don't go anywhere and enjoy it" and in general expressed displeasure being with her or "with her relatives." Their main desire at the time was to get back to the School and to their schoolmates.

From the facts determined herein, the Court concludes that these youngsters have been the victims of "marital discord" and a long "cold war" being waged between their parents and with their older brother and sister.

It is only natural that their physical, moral, mental and psychological well being has been impaired. An unhealthy environment has resulted and these youngsters cry out for their right to "happiness and contentment" in the household where they are to be reared. They have made it crystal clear that they can only find this "happiness and contentment" with their father and with their older brother and sister.

It is, of course, known to the Court that a "family (like a house) divided; soon falls" and, therefore, every effort should be exerted towards reuniting the siblings together as a family unit"; (i.e., the older brother, sister and the

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two youngsters involved herein) with the father and his new wife.

Cases are legion to the effect that a child's preference in a custody proceeding should be carefully considered but not be determinative. The expressed wishes of these children, of sufficient age and understanding, taken with all of the attending facts and circumstances, must be given considerable weight by the Court. (*Pact v. Pact,* 70 Misc. 2d 100; *Repetti v. Repetti,* 50 App. Div. 2d 913; *Matter of Ebert, supra; Peo. ex rel Norwood,* 12 App. Div. 2d 579.)

Any other policy would be practically to abandon the jurisdiction of the Court and make the child the sole judge of his own interests and welfare. (*Hahn v. Falce,* 56 Misc. 2d 427; *Pact v. Pact, supra.*)

Examination of the testimony has failed to reveal any significant credible evidence that the defendant (father) is not a "fit" guardian for these children. The Court had ample opportunity to appraise the defendant. He appeared to be a stable, firm, intelligent and strong individual, a loving, concerned and caring parent dedicated to serving the best interests of these children.

This is not to suggest in any way that the plaintiff (mother) is not equally a loving, concerned and caring parent. This lovely lady impressed the Court as a courteous and dignified gentle-woman for whom the Court has the highest regard. It is most unfortunate that for whatever reason this fine mother has lost the control, confidence and dependence of these children, which the Court prays will only be temporary. Time alone will provide the remedy—which with reasonable visitation will restore not only the love and affection of the younger siblings but also the older siblings. This, the Court dedicates its efforts and services to achieve, even though no longer holding the judicial position it now enjoys.

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The totality of the record permits of no other conclusion than that the infant children herein be placed in the custody of defendant (father). This decision, as difficult as it has been, represents the Court's opinion that the welfare and best interests of the children require such a determination. (*Doolittle v. Doolittle,* 35 App. Div. 2d 684;*Wout v. Wout,* 32 App. Div. 2d 709.)

In view of the above finding, the plaintiff's motion to dismiss and to delete visitation rights granted under the Decree of Divorce and for other allied relief requested in the cross-motion is respectfully denied.

The defendant's motion to amend the Decree of Divorce and eliminate the provisions for child support is granted in all respects. The Court has been assured that the children will be continued in Rumsey Hall School and will be provided with higher education thereafter in accordance with his financial ability. In view of the fine education afforded both Ted, Jr., and Martha, the Court is certain that defendant will do no less for Edward and Russell. Any financial assistance that may be given by the mother and her family should, of course, be continued and the Court urges full cooperation in this regard.

As to the application for the award of counsel fees by the plaintiff, the motion is in all respects granted. However, on the basis of the financial ability of both parents (both of whom will share the net proceeds of the sale of the marital home and have other income and earnings), the Court finds that the plaintiff should share the payment of counsel fees in addition to that fixed by the Court which the husband will be directed to pay.

The Court is well aware of the extensive legal services rendered by able counsel for the plaintiff not only from reading the affidavit of service filed herein but by being privy to the "day to day" services rendered during the protracted Hearing conducted herein.

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In determining the award of counsel fee to be made herein, the Court has taken into consideration all of the factors which have been enunciated over the years by our Courts; i.e., the time expended; the nature and quality of the legal services; the difficulty of the questions involved; the skill, professional standing and expertise of counsel; the benefit derived by the client and the existing customary hourly fee for legal services prevailing in the area. The above have been considered along with the ability of the husband to pay for such legal services. (For principle involved; see *Matter of Freeman,* 34 N. Y. 2d 1; *Matter of Potts,* 123 Misc. 346; aff'd 215 App. Div. 59; aff'd 241 N. Y. 593.)

Considering all of the factors related above, the Court fixes and awards counsel fees herein in the sum of Twelve Thousand ($12,000) Dollars plus disbursements of $1,500; a total of Thirteen Thousand Five Hundred ($13,500) Dollars which the defendant is hereby directed to pay to plaintiff's attorneys within thirty (30) days after the service of a copy of this Decision and Order, with notice of entry, is served herein.

By this decision, the Court has not intended to fix the value "in toto" of counsel's services. The plaintiff is liable under her retainer with her counsel and any amount not directed to be paid by the defendant (husband) herein is strictly her concern.

The Court under the Domestic Relations Law can only fix the "counsel fee" to be paid by the husband and cannot rule upon any contractual rights (if any) between plaintiff and her counsel.

The present visitation rights accorded to the plaintiff must be somewhat restricted in view of the necessity for these youngsters to enjoy their School athletic and social programs or weekend activities with their schoolmates. They should not be subject to weekly "must" visitations.

Decision and Order of the Supreme Court of New York, Westchester County, Dated December 30, 1976 (Unreported)

Accordingly, while school is in session, the plaintiff shall have visitation with the children away from the school one weekend a month (to be selected by agreement between the parties); in addition; during school holiday recess periods (more than 2 days) visitation shall be shared equally between the parents. During vacation period of each year, the plaintiff shall have the children with her for the entire month of August (subject to camp enrollments, which shall be agreed upon.)

Any other visitation shall be by agreement between the parties or by Court order, if the parties cannot agree.

The parties are directed to make all visitations interesting and enjoyable for the children. No attempts to influence them against a parent will be tolerated and no hostility shall be demonstrated by either parent towards the other in the presence of the children.

The visitation periods shall be considered by both parents as the medium of restoring and strengthening the bonds of love, affection and confidence of these children towards both parents.

The foregoing Decision contains all of the findings required under Section 4213b CPLR. The foregoing shall be deemed the Decision and Order of this Court in this proceeding. No other Order is required to be filed or served herein.

To commence the statutory time period for any appeal from this Order as of right (CPLR 5513[a]), either party is advised to serve a copy of this Order with notice of entry upon the other.

Dated: White Plains, New York
December 30, 1976

/s/ JAMES R. CARUSO
Acting Supreme Court Justice

Decision and Order of the Supreme Court of New York, Westchester County, Dated December 30, 1976 (Unreported)

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APPENDIX F.

Constitutional and Statutory Provisions Involved.

CONSTITUTIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States which provides:

> Section 1. "* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 1 of the Constitution of the United States which provides in part:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, * * *."

Article III, Section 1 of the Constitution of the United States which provides in part:

> "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *"

Article III, Section 2 of the Constitution of the United States which provides in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *"
>
> * * * In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Article VI of the Constitution of the United States which provides in part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article III, Section 1 of the Constitution of the State of New York which provides:

> "The legislative power of this State shall be vested in the Senate and Assembly."

Article VI, Section 5, subdivision (a), of the Constitution of the State of New York which provides:

> "Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken which is authorized to review such judgment or order may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing."

Article VI, Section 7, subdivision (a), of the Constitution of the State of New York which provides in part:

> "The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. • • •"

STATUTES INVOLVED.

28 USC Section 1257 which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows: . . .
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

28 USC Section 2104 which provides:

> "An appeal to the Supreme Court from a State court . . . shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States."

28 USC Section 2106 which provides:

> "The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

28 USCA Section 1651 provides, in part:

> "(a) The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law . . ."

Constitutional and Statutory Provisions Involved

Section 237, subdivision (b), of the New York Domestic Relations Law (prior to the 1978 amendment), which reads as follows:

> "Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined."

Section 238 of the New York Domestic Relations Law (prior to amendment effective July 24, 1978), which reads as follows:

> **"Expenses in enforcement proceedings**
>
> "In any action or proceeding to compel the payment of any sum of money required to be paid by a judgment or order entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six, the court may in its discretion require the husband to pay the wife's expenses in bringing, carrying on, or defending such action or proceeding."

Constitutional and Statutory Provisions Involved

Section 238 of the New York Domestic Relations Law as amended effective July 24, 1978, which reads as follows:

> **"Expenses in enforcement proceedings**
>
> "In any action or proceeding to compel the payment of any sum of money required to be paid by a judgment or order entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six, the court may in its discretion require either party to pay the expenses of the other in bringing, carrying on, or defending such action or proceeding. In any such action or proceeding, applications for counsel fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf."

Section 244 of the New York Domestic Relations Law which reads as follows:

> **"Enforcement by execution of judgment or order in action for divorce, separation or annulment**
>
> "Where the husband in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such part thereof as justice requires having a regard to the circumstances of the respective parties, together with ten dollars costs and disbursements. The application for such order shall be upon such notice to

the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy, including, but not limited to the remedy provided pursuant to the provision of section forty-nine-b of the personal property law, to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered."

APPENDIX G.

Notice of Appeal to the Supreme Court of the United States Filed in the Appellate Division of the Supreme Court of the State of New York, February 19, 1980.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

LUCY GANT CHILDS,

Respondent,

against

THEODORE Q. CHILDS,

Appellant.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Theodore Q. Childs, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, determining Sections 237(b) and 244 of the New York Domestic Relations Law to be constitutional under the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States; reversing the Order dated December 30, 1976 insofar as appealed from, modifying the Order dated July 11, 1978 and remitting the case to the Supreme Court, Westchester County, for further proceedings in accordance with the opinion, entered in this action on July 11, 1979.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Dated: February 19, 1980

s/ THEODORE Q. CHILDS
Attorney for Appellant (*Pro Se*)
150 Broadway
New York, New York 10038

Certificate of Service.

I hereby certify that on this 19th day of February, 1980, I have served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Farber, Raucher, Goldberg & Ehrlich, P.C., 275 Madison Avenue, New York, New York 10016 and on Robert Abrams, Attorney General of the State of New York, 2 World Trade Center, New York, New York 10047 by mailing such copy to each by United States mail, postage prepaid and properly addressed.

I further certify that Farber, Raucher, Goldberg & Ehrlich, P.C. are attorneys for the Appellee in this matter and that Robert Abrams is the attorney General of the State of New York, and that by service upon them, all parties required to be served have been served.

s/ THEODORE Q. CHILDS

Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1339

THEODORE Q. CHILDS,

Appellant,

against

LUCY GANT CHILDS,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

MOTION TO DISMISS THE APPEAL AND TO DENY CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1339

THEODORE Q. CHILDS,

Appellant,

against

LUCY GANT CHILDS,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

MOTION TO DISMISS THE APPEAL AND TO DENY CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

Preliminary Statement

The Attorney General of the State of New York, Intervenor-Appellee herein, moves to dismiss the appeal and to deny certiorari or, in the alternative, to affirm the order of the Appellate Division, Second Department, on the grounds that the order appealed from is not final within the meaning of 28 U.S.C. § 1257,* that the questions raised are either not substantial or require abstention, and that, in any event, the appeal was correctly decided on the merits.

* The statute is set forth herein in the "Statutes Involved" section.

Statement of Facts

This Court on March 5, 1979, in *Orr* v. *Orr,* 440 U.S. 268 (1979), held Alabama's alimony statutes invalid under the Equal Protection Clause for permitting awards only to wives after a financial fact-finding directed toward both spouses. Two weeks later, this Court remanded *Childs* v. *Childs,* 440 U.S. 952 (1979), to the Second Department of the Appellate Division of the Supreme Court of the State of New York "for further consideration in light of *Orr* v. *Orr*", *supra. Childs* involved an equal protection challenge to New York's Domestic Relations Law (DRL) § 237(b) which, literally read, authorizes counsel fee awards only to wives after a financial fact-finding directed to both husbands and wives.

On July 11, 1979, on such remand the Appellate Division rendered a decision in *Childs,* consolidated with other State appeals from orders entered therein, reported at 69 A D 2d 406 (1979). The Attorney General had intervened as a party in defense of the constitutionality of the State statutes involved pursuant to New York Civil Practice Law and Rules (CPLR) § 1012(b), Executive Law § 71. The Appellate Division upheld the constitutionality of DRL §§ 237(b) and 244* by reading them in tandem with other State statutes and in accordance with legislative intent to permit the award of counsel fees in matrimonial actions to husbands as well as to wives. The Appellate Division order remitted the proceeding to the trial court for a hearing at which appellant could apply for counsel fees. Appellant instead filed a Notice of Appeal to the New York Court of Appeals as of right under New York Civil Practice Law and Rules (CPLR) § 5601.* On October 9, 1979, the Court of Appeals dismissed the appeal because it was from a non-final order.

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* The statutes are set forth herein in the "Statutes Involved" section.

On October 25, 1979, appellant moved in this Court for leave to file a petition for a writ of mandamus (*Childs* v. *Appellate Division,* No. 76-676). He alleged that the Appellate Division had failed to comply with this Court's mandate in vacating and remanding *Childs.*

On November 6, 1979, appellant moved in the Appellate Division for an order granting him leave to appeal to the Court of Appeals under § 5062(a)(1)(i) and/or § 5602(b)(1).* The motion was denied on December 3, 1979.

On January 7, 1980, this Court entered an order denying appellant's motion for leave to file a petition for mandamus. *Childs* v. *Appellate Division,* —— U.S. ——, 48 USLW 3436.

On February 19, 1980, appellant filed a Notice of Appeal to this Court from the Appellate Division's order of July 11, 1979.

On February 29, 1980, this Court docketed appellant's Jurisdictional Statement (hereinafter "J.S."). Pursuant to Rules 16 and 34 of the Court, the Attorney General has until March 30, 1980, to move to dismiss or affirm.

Statutes Involved

A. Federal Statutes

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

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* The statutes are set forth herein in the "Statutes Involved" section.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

B. New York Statutes

Domestic Relations Law § 237. Counsel fees and expenses.

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, the court may direct the husband, or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, to pay such sum or sums of money directly to the wife's attorney to enable the wife to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the

respective parties. Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment. Upon application of the husband or the wife or the person or persons maintaining an action for annulment after the death of the husband, upon such notice to the other party and given in such manner as the court shall direct, the court may, in or before final judgment, annul or modify any such direction. Subject to the provisions of section two hundred forty-four of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in his own name in the same proceeding.

(b) Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in counsel's own name in the same proceeding.

Domestic Relations Law § 244. Enforcement by execution of judgment or order in action for divorce, separation or annulment.

Where the husband in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such part thereof as justice requires having a regard to the circumstances of the respective parties, together with ten dollars costs and disbursements. The application for such order shall be upon such notice to the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy, including, but not limited to the remedy provided pursuant to the provisions of section forty-nine-b of the personal property law, to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered.

Family Court Act § 412. Husband's duty to support wife.

A husband is chargeable with the support of his wife and, if possessed of sufficient means or able to earn such

means, may be required to pay for her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

Family Court Act § 438. Counsel fees.

In any proceeding under this article by a wife or former wife, against her husband, or former husband, including proceedings for herself and her children, or by a person on behalf of children only, or at any hearing to modify or enforce an order entered in that proceeding or a proceeding by a husband or former husband to modify a decree of divorce, separation, or annulment, including an appeal under article ten the court may allow counsel fees at any stage of the proceeding, to the attorney representing the wife, former wife or person on behalf of children.

Civil Practice Law and Rules § 5601. Appeals to the court of appeals as of right.

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the

construction of the constitution of the State or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon non-final determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

Civil Practice and Rules § 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of

right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

POINT I

The appeal should be dismissed and certiorari denied because the order appealed from is not "final" within the meaning of 28 USC § 1257 since it contemplates further proceedings which may obviate the need for constitutional adjudication.

The order appealed from remanded this case for a new hearing at which both parties could apply for an award of counsel fees. Both the Court of Appeals and Appellate Division have held that order to be non-final.*

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* It should be noted that appellant asserts that the order is final within the meaning of 28 U.S.C. § 1257. Assuming *arguendo* that he was correct, that claim places him in an inescapable dilemma. Following denial by the Court of Appeals of his appeal as of right under CPLR § 5601 and denial by the Appellate Division of his motion for leave to appeal under CPLR § 5602(a)(1)(i) and/or § 5602(b)(1), appellant still may move in the Court of Appeals itself under CPLR § 5601(a)(1)(i) for leave to appeal from a final order.

Appellant's situation is analogous to that of the petitioners for certiorari in *Matthews* v. *Huwe*, 269 U.S. 262, 266 (1925). In that case, the petitioners were "in a dilemma from which they cannot escape." If the jurisdictional ruling of the State's highest court on

(footnote continued on following page)

Under 28 U.S.C. § 1257, this Court may only entertain appeals or grant certiorari from "final judgments or decrees" of States courts. As this Court held in *Costarelli* v. *Massachusetts*, 421 U.S. 193, 196 (1975):

> "an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved. Cf. *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67 (1948); *Gorman* v. *Washington University*, 316 U.S. 98, 100-101 (1942)."

That requirement is particularly wise in a case such as this which asks the Court "to pass on constitutional issues before they have reached a definite stop", *Republic Gas Co.* v. *Oklahoma, supra*, 334 U.S. at 73. By virtue of the prior orders of this Court and the Appellate Division, there is no award outstanding against appellant for payment of counsel fees pursuant to DRL §§ 237(b) or 244. It also appears from appellant's own statements as to the financial means of the respective parties that no such order will result from the new hearing.

Appellant asserts (J.S. 11) that in 1976 his debts exceeded his assets and income while his former wife, appellee herein, "had assets of approximately $464,000.00."

(footnote continued from preceding page)

the appeal as of right was a ruling on the merits, then the petition for certiorari had to be taken from that ruling. But certiorari had been sought from the intermediate appellate court's decree. If the highest court's ruling on the appeal as of right was not on the merits, then the petitioners had to exhaust all their State remedies for review by applying to that court for permission to appeal. In either case, certiorari was improper.

So too here, if the Appellate Division's order is final, appellant must exhaust State avenues for appeal by moving in the Court of Appeals before applying to this Court. But if the Appellate Division's order is not final, it is not reviewable in this Court. In either case, review does not lie under 28 USC § 1257.

Under current case-law, it will be incumbent on appellee at the new hearing to show that she does not have sufficient funds with which to pay her attorney. If she fails to make such a showing, counsel fees must be denied. *Lebensfeld* v. *Lebensfeld,* —— A D 2d ——, 421 N.Y.S. 2d 615, 617 (2d Dept. 1979). Indeed, unless circumstances have radically changed, appellant may himself be entitled to an award of counsel fees pursuant to DRL § 237(b). See *Childs* v. *Childs, supra,* 69 A D 2d at 420.

It thus appears that upon conclusion of the new hearing, appellant will not be aggrieved, and may have been benefited, by the Appellate Division's order herein. He will therefore lack standing to complain of DRL §§ 237(b) and 244 as applied to himself. Since his rights will not have been "adversely affected by the operation of the statute", he will not then be heard to attack its constitutionality. *United States* v. *Herrera,* 584 F. 2d 1137, 1148 (2d Cir. 1978), citing *Alabama State Federation of Labor, Local No. 103* v. *McAdory,* 325 U.S. 450 (1945); *Lynch* v. *United States,* 292 U.S. 571 (1934); *Wilner* v. *United States,* 292 U.S. 571 (1934); *Board of Trade* v. *Olsen,* 262 U.S. 1 (1923); *Gallup* v. *Schmidt,* 183 U.S. 300 (1902).

The possibility exists, of course, that appellant will nonetheless be found liable for an award of counsel fees. At that time, his standing would be clear and he could then raise the constitutional issue on appeal to the highest State court and ultimately here. But the mere possibility that he

> "may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment. Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction . . . The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." *Republic Gas Co.* v. *Oklahoma, supra,* 334 U.S. at 70-71, citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341, 345, 348 (*Brandeis,* J., concurring).

The Attorney General submits that appellant has not carried his burden of showing why this Court should depart from its usual practice by accepting jurisdiction herein. Appellant's standing to challenge the constitutionality of the State statutes is dubious and the new hearing ordered may obviate the need to decide the constitutional issues. The appeal should therefore be dismissed and certiorari denied.

POINT II

The appeal should be dismissed and certiorari denied since the questions presented are either insubstantial or require abstention.

Appellant states five questions on this appeal (J.S. 9-10). The second is whether the Appellate Division violated this Court's mandate on remand. The other questions are restatements in four slightly different forms of appellant's contention that the Appellate Division could not constitutionally construe State matrimonial statutes as gender-neutral so as to render them constitutional in cases pending as of the date of this Court's decision in *Orr* v. *Orr, supra.*

As to appellant's second question, this Court's denial of his motion for leave to file a petition for a writ of mandamus is some indication* that it did not regard the Appellate Division's order as violative of its instructions on remand. Moreover, it is clear that the Appellate Division's "further consideration [of this proceeding] in light of *Orr* v. *Orr", supra,* complied with the literal language of this Court's order remanding *Childs* v. *Childs, supra,* 440 U.S. at 952, and with the intent of the Court in *Orr* v. *Orr,*

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* The motion may have been decided on an alternative ground, pendency of the motion in the Appellate Division for leave to appeal to the Court of Appeals. See *Ex parte Park Sq. Automobile Station,* 244 U.S. 412, 414-5 (1921).

*supra.** There is thus no substantial federal question presented for this Court's review on this point.

Appellant further argues (J.S. 26) that reading DRL §§ 237(b) and 244 in a gender-neutral manner is barred under the United States and New York Constitutions as judicial legislation. However, the competence of courts under the United States Constitution to uphold statutes by reading them in a gender-neutral fashion has been presumed by this Court in many cases. See *Califano* v. *Westcott,* 443 U.S. ——, 99 S. Ct. 2655, 2663-4 (1979) (collecting cases); *Orr* v. *Orr, supra,* 440 U.S. at 272. It does not present a substantial federal question for this Court's review.

While there may be some question as to the permissibility of such readings of matrimonial statutes under the New York Constitution, that is a matter upon which New York's own highest court should pass before this Court does. Its proper resolution may involve a radical revaluation of New York's constitutional history, reaching back to the early 1600's. See Attorney General's Brief, Point II.C, *Childs* v. *Childs* (2d Dept.).**

This Court held that the federal trial court should have abstained in *Moore* v. *Sims,* —— U.S. ——, 99 S. Ct. 2371, 2380 (1979), in part because

> "State courts are the principal expositors of state law."

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* The *Orr* Court noted, 440 U.S. at 272, that State alimony laws could be amended to be gender-neutral by legislative action, but it also suggested judicial reinterpretation of the laws by citing *Stanton* v. *Stanton* (I), 421 U.S. 7 (1975). On its second hearing of the *Stanton* case, this Court specifically read its first decision to require a State's highest court to apply its statute in a gender-neutral manner by reading it in light of the common law or recent legislative intent. *Stanton* v. *Stanton* (II), 429 U.S. 501, 504 n. 4 (1977).

** That portion of the Attorney General's Brief below is set forth herein as Appendix "A."

In this appeal, abstention is even more appropriate inasmuch as the question goes to the power of a New York court under its own Constitution to exposit its own statutes. See *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 500-501 (1941). It is the quintessence of a State matter from which the Federal courts should abstain.

Appellant also argues (J.S. 27-28, 33-36) that even if the Appellate Division had the power to reinterpret New York's statutes, it did so incorrectly herein. But New York's highest court, the Court of Appeals, has not yet ruled on the proper reading of New York's matrimonial laws since *Orr* v. *Orr, supra.* Whether it will read DRL §§ 237 and 244 as gender-neutral is still unclear. Compare *Childs* v. *Childs, supra,* 69 A D 2d at 418-20 (upholding DRL §§ 237(b) and 244 under a gender-neutral reading), with *Greschler* v. *Greschler,* 71 A D 2d 322, 327-9 (2d Dept. 1979) (holding that General Obligations Law (GOL) § 5-311, imposing greater limitations on wives than husbands in separation agreements, cannot be read in a gender-neutral manner and is unconstitutional); *Wilcox* v. *Wilcox,* —— Misc 2d —— (Oswego Fam. Ct. Jan. 11, 1980) (holding that DRL § 236 cannot be read in a gender-neutral manner and is unconstitutional). Under this Court's usual abstention rules, see *Railroad Commission* v. *Pullman Co., supra,* New York's highest court should be given an opportunity to construe the State's statutes before this Court rules on their proper interpretation.

Appellant finally challenges the application of a gender-neutral reading to his case because the statute was not so read at the time of the original counsel fee award and was therefore void *ab initio* (J.S. 31-32, 37-38). This Court has already clearly indicated that State courts may limit *Orr* v. *Orr, supra,* 440 U.S. at 275 & n. 4-5, to prospective effect. The extent of *Orr's* applicability to pending cases in New York is still unclear. Compare *Childs* v. *Childs, supra,* 69 A D 2d at 420 (not retroactive with respect to

DRL §§ 237 and 244); *Tate* v. *Tate,* n.o.r., N.Y.L.J. April 2, 1979, at p. 11, col. 6 (N.Y. Co. Sup. Ct.), *aff'd.* —— A D 2d ——, 422 N.Y.S. 2d 709 (1st Dept. Dec. 18, 1979) (not retroactive with respect to GOL § 5-311), with *Greschler* v. *Greschler, supra,* 71 A D 2d at 329 (retroactive with respect to GOL § 5-311). The Court of Appeals has not ruled on the issue of the retroactivity of *Orr* v. *Orr, supra.*

Since this Court has committed the question of retroactivity to the State courts, and since New York's highest court has not yet ruled on whether the statutes can be read in a gender-neutral manner at all, much less retroactively, the Court should abstain from ruling on it at this time. Cf. *Railroad Commission* v. *Pullman Co., supra.*

This Court has repeatedly held that Federal courts should not reach out to decide constitutional questions when a statutory ground of decision exists. *Beazer* v. *New York City Transit Authority,* 440 U.S. 568, 582 & n. 22 (1979). In the present case, a decision that DRL §§ 237(b) and 244 cannot be read in a gender-neutral manner would obviate the need to reach any other issues herein. Since Federal abstention from the question of State statutory construction is mandatory, this Court should abstain from rendering an advisory opinion on further questions that might not have to be reached.

In sum, abstention is mandatory from the questions appellant raises as to the Appellate Division's powers under the New York Constitution to read statutes in a gender-neutral manner, the correctness of that interpretation, and its retroactivity. Since decision thereon might obviate reaching appellant's other questions as to the Appellate Division's compliance with this Court's order on remand herein or as to the Appellate Division's powers under the federal Constitution to interpret State statutes in a gender-neutral manner, the Court should likewise abstain from those questions. In any event, they do not present substantial federal questions for this Court's review.

POINT III

Assuming *arguendo* that probable jurisdiction is noted herein, the Court should affirm.

Assuming *arguendo* that probable jurisdiction is found by this Court, the Court should affirm for the reasons hereinafter discussed.

Reviewing the questions appellant raises, it is clear that the Appellate Division fully complied with this Court's mandate to consider this case further in light of *Orr* v. *Orr, supra.* See pp. 13-14, *supra.* It is also clear that the Appellate Division had the power under the United States Constitution to read State matrimonial statutes in a gender-neutral manner. See p. 14, *supra.*

Although New York's Court of Appeals has not passed directly on appellant's objections to the Appellate Division's power to read DRL §§ 237(b) and 244 in a gender-neutral manner, to the interpretation itself, and to its application to pending cases, some indication that it would approve of the Appellate Division's decision in *Childs* v. *Childs, supra,* may be found in its jurisdictional ruling two months later on the appeal in *Roberts* v. *Roberts,* 48 N Y 2d 631 (1979). Appellant therein challenged analogous statutes, Family Court Act §§ 412 and 438,* authorizing counsel fees to the wife only in a support proceeding. The Court of Appeals denied direct appeal as of right to it from the trial court on the constitutional issues, citing *Powers* v. *Porcelain Insulator Corp.,* 285 N.Y. 54 (1941). Under the latter case, the Court of Appeals had held that a direct appeal does not lie

> "if in order to reach a decision on the merits it is necessary to pass upon some question other than the constitutionality of a statute, as, for example, a question of statutory construction", 285 N.Y. at 57.

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* The statutes are set forth herein in the "Statutes Involved" section.

While the Court of Appeals' jurisdictional ruling does not amount to a ruling on the merits and does not remove the need for abstention herein (see pp. 14-16, *supra*), assuming *arguendo* that the issues were reached, the jurisdictional ruling in *Roberts* v. *Roberts, supra,* suggests that the Court of Appeals would not find the Appellate Division's approach in *Childs* v. *Childs, supra,* to be repugnant to the Federal or State Constitutions or to the State's statutes.

Appellant raised below the same arguments that he asserts now. The Appellate Division's scholarly opinion contains ample authority for that Court's powers to read the statutes challenged herein with others *in pari materia* and in accordance with legislative intent as gender-neutral and to apply that reading to pending cases. *Childs* v. *Childs, supra,* 69 A D 2d at 418-20. Should the issues be reached by this Court, the order below should therefore be affirmed on the opinion of the Appellate Division.

CONCLUSION

The appeal should be dismissed and certiorari denied. In the alternative, the order should be affirmed on the opinion below.

Dated: New York, New York
March 28, 1980

Respectfully submitted,

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APPENDIX A

Attorney General's Brief, Point II.C, *Childs* v. *Childs* (2d Dept.).

C. Reexamination Of New York Legal History Shows That The Court May Fashion An Equitable Remedy Between The Parties.

One of the major factors militating *against* a liberal reading of the State's alimony and counsel fee laws has been the widely expressed view that these subjects are purely statutory in New York and not part of the common law. See, e.g., *Steinberg* v. *Steinberg,* 46 A D 2d 684 (2d Dept. 1974), app. dsmd. 36 N Y 2d 690 (1975); Foster and Freed, "Orr v. Orr and the Counterrevolution," N.Y.L.J. March 13, 1979, p. 1, col. 1, at p. 5, col. 4; N.Y. Statutes § 4, at 30 (McKinney 1971). The assumption is that if New York were not restricted to statutory sources, it would "have a reserve of equitable principles to call upon in order to supplement [matrimonial] statutes. . . ." Foster and Freed, *supra,* at 5, col. 4.

Closer investigation shows that the asserted lack of equitable jurisdiction in divorce cases does not appear to have been critically reviewed by the appellate courts in this century. The Attorney General respectfully submits that legal research published after the decisions stating that proposition shows it to be incorrect.

Our analysis indicates that New York courts can refer to English common law precedents on divorce to make alimony, support and counsel fee awards. It is true that the common law did not provide for such awards for husbands, Poynter, *Concise View of the Doctrine and Practice of the Ecclesiastical Courts in Doctors' Commons on Various Points Relevant to the Subject of Marriage and Divorce,* 252 *et seq.* (2d Ed. 1824). Once equitable jurisdiction has been found, the Courts can expand the common law to reach new conditions, furnishing new remedies to avoid

gross injustice. See, e.g., *Piper* v. *Hoard,* 107 N.Y. 73, 82 (1887); *Schwartz* v. *Lubin,* 6 A D 2d 108, 111 (1st Dept. 1958); *Amsden* v. *Amsden,* 202 Misc. 391, 393 (Monroe Sup. 1952); *Morris* v. *Morris,* 138 Misc. 682, 686-7 (Schenectady Sup. 1930), affd. 234 A.D. 187 (3d Dept. 1931), affd. 260 N.Y. 650 (1932). So, too, in this case the Courts can avoid gross injustice to wives by using their equitable powers to read the statutes to do justice between both parties by allowing awards to either husbands or wives, as the circumstances of the particular cases demand.

The Constitution of New York of 1894, as amended, provides now, art. I, § 14, as each prior Constitution has provided, Const. 1846, Art. I, § 17; Const. 1821, Art. 7, § 13; Const. 1777, Art. 35, that

> "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, . . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated."

In determining "that the law of England concerning divorces and matrimonial causes, was never adopted in the colony of New York", *Burtis* v. *Burtis,* 1 Hopk. 564 (Ct. Chanc. 1825), Chancellor Sandford laid emphasis on the fact that before the Revolution only four divorces had ever been granted in New York and only by one colonial governor and council, that no colonial law was ever enacted

for divorce, that no colonial court was explicitly granted such jurisdiction, and that no colonial court ever exercised such jurisdiction. Thus, he argued, the common law on matrimonial actions "was not adopted in fact or in practice, and it was never the law of the colony . . . [and] did not become the law of the state." *Id.,* 1 Hopk. at 564-5. Even if the common law had been in force, the Chancellor argued, it would be repugnant to the statutory scheme for divorce established by the Legislature because it would give the courts jurisdiction to grant divorces for causes the Legislature had not chosen to recognize. *Id.,* 1 Hopk. at 566.

Chancellor Sandford's determination has repeatedly been relied on thereafter as the basis for holding that New York courts have only such power over divorces as is granted by statute. See, e.g., Kent, *Commentaries,* vol. 2, at 97 (1826); *Erkenbrach* v. *Erkenbrach,* 96 N Y 456, 464 (1884). It should be noted, however, that Chancellor Sandford did not himself establish such a broad proposition because he affirmed the jurisdiction of courts of equity to vacate marital contracts obtained through fraud. *Burtis* v. *Burtis, supra,* 1 Hopk. at 567-8; *Ferlat* v. *Gojon,* 1 Hopk. 478, 494-5 (1825).

Moreover, three of the four factual findings for his holding that English divorce law had not been adopted in New York are clearly wrong. There were more divorces than he reported.* There were also colonial laws for divorce

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* The four divorces that the Chancellor had found to be extraordinary acts by one governor, standing alone in the history of the colony, *Burtis* v. *Burtis, supra,* 1 Hopk. at 564, were in fact at least six in number, by at least two governors, and were issued by the governors sitting with their councils as courts to hear charges and render judgments. See Chester, *Legal and Judicial History of New York,* 316-8 (1911).

and courts with divorce jurisdiction of which he apparently was not aware.*

It is not even clear that he was correct in asserting that the common law of matrimony had fallen into disuse at the time of the Revolution. Certainly, Chancellor Kent, who was older than Chancellor Sandford and more likely to have been aware of the actual practice fifty years before, at one time believed that it *was* a vital part of the colony's common law and, therefore, supplemented the new state's statutes. See, e.g., *Wightman* v. *Wightman,* 4 Johns. Ch. 343, 346-7 (1820); *Aymar* v. *Roff,* 3 Johns. Ch. 50 (1817). Chancellor Kent appears later to have changed his views, *Commentaries,* vol. 2, at 97, but he did so, *id,* at 96, in reliance on *Burtis,* not on his own knowledge of conditions at the time of the Revolution.

But whether that part of the common law was being actively relied upon does not affect its incorporation in New York law. In determining whether English common law became part of New York law, the Court of Appeals has noted that the lack of reported decisions is not persuasive because even important common law principles

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* The Burgher Courts of the Colony of New Amsterdam which were for a time continued in existence after the English took control in 1664 had jurisdiction over separation of man and wife. They had the power to make orders for the division of property and the custody of children. Chester, *Courts and Lawyers of New York,* 137 *et seq.* (1925), citing Daly, *History of the Bench and Bar of New York* (1897). Moreover, at least one court established by the Colony of New York had limited divorce jurisdiction. The Court of Chancery established in 1683, 1 Colonial Laws 125, 128 [Chap. 7, L. 1683], had "power to heare and determine all matters of Equity. . . ." The Governor and his Council formed a High Court of Chancery for appeals, but delegated their authority to the "Chancellour." In 1684 the High Court was given jurisdiction to annul a marriage when a person had remarried believing his or her spouse dead following a five-year absence on a foreign trip. 1 Colonial Laws 150, 151 [Chap. 10, L. 1684]. The grant of equity jurisdiction was continued when the colonial courts were settled in 1691. 1 Colonial Laws 226, 230 [Chap. 4, L. 1691].

were not always published. *Waters & Co.* v. *Gerard,* 189 N.Y. 302, 314 (1907). In the case cited, the Court accepted as part of New York's common law heritage an inn-keeper's lien on a guest's possessions which were the property of a third person. It did so despite the fact that there was no New York statute or case law precedent for such a lien prior to the Revolution and only four reported English cases, dating from 1612, 1617 and 1703. *Id.,* at 313, 316-7. Once a common law principle was stated, it became part of New York law, even if it was not clear that it was still in use at the time of the Revolution, so long as it was "applicable to our conditions" and was not "abrogated or modified by express constitutional or statutory enactments." *Id.,* at 309.

In arguing that the common law of matrimony did become part of this State's law, the Attorney General does not suggest that the cases which have stated the contrary should be over-ruled. Rather, those statements should be recognized as dicta and the decisions restricted more closely to the situations before the courts. As Chancellors Kent and Sandford recognized New York courts inherited from the common law the power to declare marriages absolutely void, even in the absence of a statute. *Perry* v. *Perry,* 2 Paige Ch. 501, 506 (1831); *Burtis* v. *Burtis, supra; Ferlat* v. *Gojon, supra; Wightman* v. *Wightman, supra.* After the Legislature had acted, however, to specify which marriages *de facto* could be dissolved by the courts and on what grounds, Chap. 69, L. 1787, the common law grounds for such divorces were no longer consistent with the statutory scheme and could not be applied. *Perry* v. *Perry, supra,* 2 Paige Ch. at 506, *Burtis* v. *Burtis, supra,* 1 Hopk. at 565-8.

But as to the incidental effects of divorce, such as alimony, support and counsel fees, the Legislature never took hold of the entire area in such a way as to erase the Court's equitable jurisdiction over the subject matter. Indeed, when the Legislature at first granted husbands "the same rights . . . and . . . the same relief for the like causes

as femes convert," Chap. 205, L. 1824, § 12, and later removed it, Revised Statutes, Pt. 2, Chap. 8, Tit. 1, §§ 45, 54, it did not explicitly state that support could not be awarded.

Other states where the common law is applicable have held that such incidental awards may be made unless forbidden by statute. See, e.g., *Beal* v. *Beal,* 388 A. 2d 72, 76 (Me. Sup. 1978); *Killingsworth* v. *Killingsworth,* 284 Ala. 524, 226 So. 2d 308, 313 (Sup. 1969). New York can likewise in the exercise of its equity jurisdiction mold common law principles to meet today's conditions, as argued above, by reading DRL §§ 236-237 to permit awards of alimony or counsel fees to a husband in an appropriate case. *Thaler* v. *Thaler, supra.* Such a reading would permit the Court to uphold the statute under the rationale of *Orr,* pending legislative action.